



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

2 w
17

OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME XXV.

CASES ADJUDGED
IN
THE COURTS OF APPEAL AND CIR-
CUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY,
1916.

212
L.
P. 1
C-1.

**COPYRIGHT, 1916,
BY THE OHIO LAW REPORTER COMPANY.**

DEC 22 1916

JUDGES OF THE APPELLATE (FORMERLY CIRCUIT) COURTS OF OHIO.

HON. REYNOLDS R. KINKADE, *Chief Justice*, Toledo.
HON. PHILLIP M. CROW, *Secretary*, Kenton.

FIRST DISTRICT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

EDWARD H. JONES Hamilton
OLIVER B. JONES Cincinnati
FRANK M. GORMAN Cincinnati

SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

H. L. FERNEDING Dayton
ALBERT H. KUNKLE Springfield
JAMES I. ALLREAD Columbus

THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

PHILLIP M. CROW Kenton
TIMOTHY T. ANSBERRY Defiance
WALTER H. KINDER Findlay

FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

EDWIN D. SAYRE Athens
MATTHEW F. MERRIMAN Gallipolis
FESTUS WALTERS Circleville

FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

ROBERT S. SHIELDS Canton
LOUIS K. POWELL Mt. Gilead
LEWIS B. HOUCK Mt. Vernon

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

SILAS S. RICHARDSClyde
CHARLES E. CHITTENDENToledo
REYNOLDS R. KINKADEToledo

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

W. H. SPENCELisbon
JOHN POLLOCKSt. Clairsville
WILLIS S. METCALFEChardon

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

WALTER D. MEALSCleveland
CHARLES R. GRANTAkron
A. G. CARPENTERCleveland

TABLE OF CASES.

Adams Express Co. v. Wynne	49	Cheboygan Dredge & Dock Co. v. Smith	142
American Trust Co. v. Vincent	132	Chillicothe Electric R. R., Light & Power Co. v. N. & W. Ry.	572
Auglaize Box Board Co. v. Connecticut Fire Ins. Co.	339	Christian, Norwalk v.	419
Aultman & Taylor Co., Smitt v.	561	Cincinnati, Burckhardt v.	542
		Cincinnati v. Cincinnati Traction Co.	513
B. & O. R. R. v. Koons	433	Cincinnati, Dietz v.	506
B. & O. S. W. Ry., Bailey v.	305	Cincinnati, Dreidame v.	607
B. & O. S. W. Ry., Joslin-Schmidt Co. v.	379	Cincinnati v. Puchta	458
Bailey v. B. & O. S. W. Ry.	305	Cincinnati Car Co. v. Snyder	33
Baker, Cleveland v.	369	Cincinnati Traction Co. v. Burkhardt	208
Baker, State B. & L. Co. v.	351	Cincinnati Traction Co., Cincinnati v.	513
Barlow v. Ostott	347	Cincinnati Traction Co. v. Wynne	49
Bederman v. Otisville State Bank	173	Clapham, Brownfield v.	443
Bellevue Farmers Grain Co. v. Fronizer	151	Cleveland v. Baker	369
Bennett v. P., C., C. & St. L. Ry.	335	Cleveland, Etzensperger & Orschak v.	303
Bennett v. Pennsylvania Co.	335	Cleveland, Stange v.	599
Bernhard, Schell v.	411	Cleveland Electric Ry., Downing v.	404
Bertram v. Theobald Munford Co.	111	Cline, Miller v.	492
Bidwell, Mossop v.	502	Cochran v. State	430
Black, Guernsey County Commissioners v.	415	Columbus Ry. & Light Co., McGinn v.	212
Bloch Realty Co., Fagins v.	122	Compton-Price Piano Co. v. Stewart	270
Bone, State v.	447	Connecticut Fire Ins. Co., Auglaize Box Board Co., v.	339
Brown, In re Charlotte T.	63	Cortesi v. Firemen's Fund Ins. Co.	509
Brownfield v. Clapham	443	Crawford v. Merrell	537
Bryan v. Woodmansee	481	Creager, Fisher - Barkdull Farm Agency v.	95
Buchamann, McKenzie v.	529	Crow, Farmers' Mutual Fire & Lightning Ins. Assn. v.	65
Bumiller, Walker v.	385	Crowley v. State	113
Burckhardt v. Cincinnati	542	Curry, Hutton v.	22
Burkhardt, Cincinnati Traction Co. v.	208	Cushing, State, ex rel Berry, v.	11
Burton, Preston & Co. v. National Granite Co.	470		
Buttemiller v. Schmid	201	D. T. Williams Valve Co. v. Williams	497
		Dawson v. State	257
C., H. & D. Ry. v. Myers & Patty Co.	204	Day Co., Gibbons v.	559
C., H. & D. Ry. v. Winnes	321		
C., K. & S. Ry., Maynard Coal Co. v.	276		
C., M. & S. Electric Ry., Schueszler v.	401		

Dennedy v. St. Theresa's Home	465	Howenstein, Peters v.	317
Dietz v. Cincinnati	506	Hubig v. Kewitt & Frederick .	146
Downing v. Cleveland Electric Ry.	404	Humbert, Owens v.	522
Dreidame v. Cincinnati	607	Huss v. Toledo Railway & Light Co.	44
DuBois v. Schell	17	Hutton v. Curry	22
Dunson, McAdams v.	40	Hyman State ex rel Coolidge v.	361
Eisen v. Halloran	29	In re Brown	63
Eisenstadt v. Lucke	225	In re Robinson	26
Emmerman v. Ohio Iron & Metal Co.	70	In re Rosenthal	383
Engel v. Rothman	475	In re Williams	249
Etzensperger & Orschak v. Cleveland	303	J. H. Day Co., Gibbons v. .	559
Fagins v. Bloch Realty Co. .	122	Jerome, Love, Piket & Nulsen v.	149
Farmers' Mutual Fire & Lighting Ins. Assn. v. Crow ..	65	Joslin-Schmidt Co. v. B. & O. S. W. Ry.	379
Fesler, Foster v.	449	Kelley, State ex rel Gellner v.	1
Firemen's Fund Ins. Co., Cortesi v.	509	Kewitt & Frederick, Hubig v. .	146
Fisher-Barkdull Farm Agency v. Creager	95	Klages v. Kronenbitter	191
Fleming v. Minx	198	Koblitz, Prescott v.	84
Folz, Supreme Council Royal Arcanum v.	97	Koone, B. & O. R. R. v.	433
Fosdick, State ex rel Fisher v.	241	Kreimer v. State	440
Foster v. Fesler	449	Kronenbitter, Klages v.	191
Francis v. State	281	Larkin, McCune v.	118
Frederick v. Owens	581	Lebanon v. Schwartz	273
Fronizer, Bellevue Farmers Grain Co. v.	151	Lewis v. Lingrel	55
Gaisser v. Hansen	262	Love, Piket & Nulsen v. Jerome	149
General Railway Signal Co. v. Valois	423	Love, Reno v.	129
Gibbons v. J. H. Day Co. ...	559	Lucke, Eisenstadt v.	225
Gibson & Price Co. v. Rouse & Hills Co.	72	Ludwig, Thurston v.	298
Guernsey County Commissioners v. Black	415	McAdams v. Dunson	40
Gulling, Pennsylvania Co. v. .	326	McCarthy v. Hansel	283
H. S. Hamberger Co. v. Miller Bros. & Co.	234	McCune v. Larkin	118
Haas v. Haas	107	McGinn v. Columbus Ry. & Light Co.	212
Halloran, Eisen v.	29	McKenzie v. Buchamann	529
Hamberger Co. v. Miller Bros. & Co.	234	Manchester, Tuke v.	337
Hansel, McCarthy v.	283	Masonic Temple Co., Southern Surety Co. v.	292
Hansen, Gaisser v.	262	Maynard Coal Co. v. C., K. & S. Ry.	276
Haserodt, Susan v.	221	Merchants' Banking & Storage Co. v. Ryder	158
Hemmeter, Wickendraeger v.	365	Merrell, Crawford v.	537
Hirstius, State ex rel Gentsch v.	177	Miller v. Cline	492
		Miller Bros. & Co., Hamberger Co. v.	234
		Minx, Fleming v.	198
		Moore's Lime Co. v. Norfolk & Western Ry.	527

TABLE OF CASES.

vii

Mossop v. Bidwell	502	Rosenthal, In re	383
Munford Co., Bertram v.	111	Rothman, Engel v.	475
Myers v. State	556	Rouse & Hills Co., Gibson & Price Co. v.	72
Myers & Patty Co., C., H. & D. Ry. v.	204	Ryder, Merchants' Banking & Storage Co. v.	158
N. & W. Ry., Chillicothe Elec- tric R. R., Light & Power Co. v.	572	Schell v. Bernhard	411
Nassr v. Upton	193	Schell, DuBois v.	17
National Box Board Co., Ogles- bey v.	61	Schmid, Buttemiller v.	201
National Fireproofing Co., Stripe v.	551	Schroth, Seney v.	185
National Granite Co., Burton, Preston & Co. v.	470	Schueszler v. C., M. & S. Elec- tric Ry.	401
Norfolk & Western Ry., Moores Lime Co. v.	527	Schwartz, Lebanon v.	273
Norwalk v. Christian	419	Seney v. Schroth	185
Oglesbey v. National Box Board Co.	61	Shuttleworth, Snyder v.	545
Ohio Iron & Metal Co., Em- merman v.	70	Sinnock v. Pennsylvania Co. .	479
Otisville State Bank, Beder- man v.	173	Slemmons v. Toland	485
Ottstott, Barlow v.	347	Smith, Cheboygan Dredge & Dock Co. v.	142
Owens, Frederick v.	581	Smitt v. Aultman & Taylor Co.	561
Owens v. Humbert	522	Snyder, Cincinnati Car Co. v.	33
P., C., C. & St. L. Ry., Ben- nett v.	335	Snyder v. Shuttleworth	545
Pennsylvania Co., Bennett v.	335	Snyder, State Liability Board of Awards v.	161
Pennsylvania Co. v. Gulling .	326	Southern Surety Co. v. Ma- sonic Temple Co.	292
Pennsylvania Co., Sinnock v. .	479	Stange v. Cleveland	599
Peters v. Howenstein	317	State v. Bone	447
Petri v. State	255	State, Cochran v.	430
Prescott v. Koblitz	84	State, Crowley v.	113
Puchta, Cincinnati v.	458	State, Dawson v.	257
Railway, Bailey v.	305	State, Francis v.	281
Railway, Bennett v.	335	State, Kreimer v.	440
Railway, Chillicothe Electric R. R., Light & Power Co. v. .	572	State, Myers v.	556
Railway, Downing v.	404	State, Petri v.	255
Railway v. Gulling	326	State, Stryk v.	166
Railway, Joslin-Schmidt Co. v.	379	State ex rel Berry v. Cush- ing	11
Railway v. Koons	433	State ex rel Campbell v. Wes- selmann	575
Railway, Maynard Coal Co. v.	276	State ex rel Coolidge v. Hy- man	361
Railway v. Myers & Patty Co.	204	State ex rel Fischer v. Fos- dick	241
Railway, Schueszler v.	401	State ex rel Gellner v. Kelley .	1
Railway, Winnes v.	321	State ex rel Gentsch v. Hir- stius	177
Reno v. Love	129	State ex rel Hogan v. Ren- schler	218
Renschler, State ex rel Hogan v.	218	State ex rel Larwill v. Vail .	408
Rickard v. Utter	577	State B. & L. Co. v. Baker .	351
Robinson, In re	26	State Liability Board of Awards v. Snyder	161
		Stewart, Compton-Price Piano Co. v.	270
		Story, Union Reduction Co. v.	533

Stripe v. National Fireproof- ing Co.	551	Vail, State ex rel Larwill v. .	408
Stryk v. State	166	Valois, General Railway Sig- nal Co. v.	423
St. Theresa's Home, Dennedy v.	465	Varsey v. Varsey	229
Supreme Council Royal Arca- num v. Folz	97	Vincent, American Trust Co. v.	132
Susan v. Haserodt	221		
Theobald Munford Co., Ber- tram v.	111	Walker v. Bumiller	385
Theurkauf v. Wright	183	Wesselmann, State ex rel Campbell v.	575
Thurston v. Ludwig	298	Wickendraeger v. Hemmeter .	365
Toland, Slemmons v.	485	Williams, In re	249
Toledo Railways & Light Co., Huss v.	44	Williams Valve Co. v. Wil- liams	497
Tuke v. Manchester	337	Winnes, C., H. & D. Ry. v. .	321
		Woodmansee, Bryan v.	481
Union Reduction Co. v. Story	533	Wright, Theurkauf v.	183
Upton, Nassr v.	193	Wynne, Adams Express Co. v.	49
Utter, Rickard v.	577	Wynne, Cincinnati Traction Co. v.	49

OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME XXV.

CAUSES ARGUED AND DETERMINED IN THE COURTS OF
APPEAL AND THE CIRCUIT COURTS
OF OHIO.

WRIT OF PROHIBITION IN A DIVORCE PROCEEDING.

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF MARIE GELLNER, v. JOSEPH
B. KELLEY, JUDGE OF THE INSOLVENCY COURT.

Decided, March 20, 1916.

*Prohibition—Action for a Writ of—In a Proceeding for Divorce Where
Jurisdiction Was Denied—High Prerogative of a Writ of Prohibition
—Can Not be Made to Serve the Purpose of a Writ of Error—When
it May be Invoked—Power to Create a Court Implies Power to
Change its Jurisdiction—Pending Cases Where Jurisdiction is With-
drawn—And no Provision Made for Their Transfer to Another
Court—Are Terminated and Should be Held for Naught.*

The amendment of Section 1637, General Code, of February 17, 1914
(104 Ohio Laws, 179), operated to withdraw from the Court of
Insolvency of Hamilton County jurisdiction to hear and determine
actions for divorce and alimony after December 31, 1914, even
though pending at that date.

J. G. DeFosset, for relator.

C. W. Baker and *Jos. B. Kelley*, contra.

JONES (Oliver B.), J. .

This is an action for a writ of prohibition brought by the state, on the relation of Marie Gellner, as relator, against Joseph B. Kelley, judge of the Insolvency Court of Hamilton County, Ohio, as respondent, to prevent him as such judge from proceeding to hear and determine a certain divorce proceeding in said court in which said relator is the defendant.

It is averred in the petition and admitted in the answer that on August 20, 1914, a petition for divorce was filed in said insolvency court by one John Gellner against his wife, Marie Gellner, the relator herein, as defendant; that on August 29th, 1914, said Marie Gellner filed an answer and cross-petition in said cause praying for divorce and alimony; that on February 18, 1915, an amended petition was filed by said plaintiff; and on May 21, 1915, said defendant was granted leave to withdraw her original answer and cross-petition and file an amended answer, which was thereupon done.

It appears that an order was made by said court on September 19, 1914, requiring the plaintiff in said cause to pay the defendant, as alimony, for the support of herself and minor children, the sum of \$4.50 every week, and that on February 5, 1915, charges in contempt were filed against said plaintiff for the failure to pay said alimony; and that said cause was on September 15, 1915, heard in part by said insolvency court. It is averred by plaintiff that at such hearing testimony was offered by plaintiff to show that he lived in the village of Dakota, state of West Virginia, with his wife and children and the family of defendant's father and mother, from about November, 1912, to March, 1914, and that he had not been a resident of the state of Ohio for a year prior to the filing of his petition on August 20, 1914. Said relator avers that at the conclusion of plaintiff's testimony in said divorce trial defendant moved for a dismissal of plaintiff's petition, which motion was overruled, and defendant then offered testimony as to the residence of plaintiff and at the conclusion of all the testimony again moved the court to dismiss the plaintiff's petition, for want of jurisdiction, which

1916.]

Hamilton County.

said motion was overruled, to which ruling defendant then excepted, and the cause was thereupon continued by the court, for further hearing, to January 15, 1916.

Under Section 1637, General Code, courts of insolvency were given jurisdiction concurrent with the court of common pleas in certain matters, and among others in "actions for divorce and alimony." On February 6, 1914, an act was passed by the General Assembly entitled:

"An act to amend Section 1637 of the General Code to take away the jurisdiction of the Insolvency Court of Hamilton County in divorce and alimony cases."

By this act Section 1637 was re-enacted in its original form, except that in paragraph 9 thereof where certain matters were enumerated in which said court of insolvency was given jurisdiction, after the words "and actions for divorce and alimony" were added the words:

"except the court of insolvency in Hamilton county shall not have jurisdiction in actions for divorce and alimony after December 31st, 1914."

Relator prays for a writ of prohibition against proceeding in said divorce action upon two grounds:

1. The Court of Insolvency in Hamilton County has had no jurisdiction in the subject-matter of the action since December 31, 1914.

2. The said court has no jurisdiction of the action for the reason that the plaintiff was not a resident of Ohio for at least one year before filing his petition. (General Code, 11980.)

The writ of prohibition is a remedy brought into the jurisprudence of Ohio by amendments to the Constitution which became effective January 1, 1913. Original jurisdiction in prohibition is vested in courts of appeals by Section 6, Article IV of the Constitution. No statutory provisions have as yet been enacted laying down rules of procedure for the exercise of this jurisdiction.

Cases of prohibition have, however, been entertained both in courts of appeals and in the Supreme Court. The case of *Ex Parte Oldham*, 19 C.C.(N.S.), 270, was one in which it was sought to restrain the judges of the courts of common pleas from acting as a conservancy court. The case of *State, ex rel Berry, v. Cushing, Judge*, decided by this court, *post*, was an action in which it was sought to prohibit a judge of the common pleas court from proceeding to hear a motion to dissolve an attachment on appeal from the Municipal Court of Cincinnati.

Two cases in prohibition have recently been decided by the Supreme Court. The syllabus of each of these cases is to be found in No. 49, Ohio Law Reporter for March 6, 1916, Vol. 13, pages 43 and 44—being *State, ex rel Garrison, v. Brough et al*, and *State, ex rel Nolan, v. Clendenning*. In these cases, in which we have seen advanced copies of the opinion of the court not yet published, the object and use of the writ of prohibition is clearly stated. Paragraph 1 of the syllabus of the first named case is as follows:

“The writ of prohibition is an extraordinary legal remedy, whose object is to prevent a court or tribunal of peculiar, limited or inferior power, from assuming jurisdiction of a matter beyond its cognizance. The writ can not be made to serve the purpose of a writ of error to correct mistakes of the lower court in deciding questions of law within its jurisdiction.”

Paragraphs 2, 3 and 4 of the syllabus of the second case are:

“2. The writ of prohibition is a high prerogative writ to be used with great caution in the furtherance of justice and only where there is no other regular, ordinary and adequate remedy.

“3. The writ may be invoked against any inferior court or inferior tribunal, ministerial or otherwise, that possesses incidentally judicial or *quasi* judicial powers, to keep such courts and tribunals within the limits of their own jurisdiction.

“4. If such inferior courts or tribunals in attempting to exercise judicial or *quasi* judicial power are proceeding in a matter wholly or partly outside of their jurisdiction, such inferior courts or tribunals are amenable to the writ of prohibition as to such *ultra vires* jurisdiction.”

1916.]

Hamilton County.

If, therefore, the court of insolvency is now wholly without jurisdiction to hear and determine a case for divorce and alimony, it would become the duty of this court to allow the issue of the writ to prevent it from undertaking to exercise such jurisdiction.

The main question to be determined is whether the Court of Insolvency of Hamilton County has jurisdiction to try an action for divorce and alimony after December 31, 1914.

The Court of Insolvency of Hamilton County is a local court established by act of the General Assembly under authority granted by Section 1, Article IV of the Constitution. The constitutionality of the law creating it was upheld in *State, ex rel, v. Archibald*, 52 O. S., 1. An amendment to the act conferring certain jurisdiction upon it (93 O. L., 669) was held invalid as being obnoxious to Section 26, Article II, in so far as it attempted to confer exclusive jurisdiction on that court of various matters within the jurisdiction of the court of common pleas.

The constitutionality of the law establishing the Insolvency Court of Cuyahoga County, which is similar to that of Hamilton county, was directly sustained in *State, ex rel, v. Bloch*, 65 O. S., 370. In discussing the power of the Legislature in respect to the establishment of such courts and fixing their jurisdiction, the court uses the following language in the opinion in that case, at page 391:

“The power is here undoubtedly granted to the General Assembly to create courts other than those enumerated in the section; and the material inquiry is, what *other courts* may be so created? The answer is found in the language of the section, which is, ‘such’ other courts ‘as the General Assembly may from time to time establish.’ That language vests in that body full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction and powers. The only limitation placed upon the exercise of that power is that the courts so established shall be inferior to the Supreme Court, subject, of course, to the further qualification that no legislation can alter the judicial system established by the Constitution, nor interfere with the courts designated by that instrument as the recipi-

ents of the judicial power. Apparently there could have been but one purpose in making this special grant of legislative power, and that was to enable the General Assembly to meet the public needs for additional courts, as they might arise in different parts of the state. It is hardly probable that it was considered or contemplated that the same necessities in that respect would arise at the same time in all parts of the state. Hence, the power was given to establish these additional courts from time to time, as in the opinion of the legislative body the public exigencies should appear to render necessary or proper."

There is, therefore, no question as to the power of the General Assembly to create or to abolish such a court as it may deem best. Its right to abolish such a statutory court at any time was sustained in *State, ex rel, v. Wright*, 7 O. S., 333.

The entire jurisdiction of such a court must be derived from the statutes. The power to create the court necessarily implies the duty to define the jurisdiction, and this jurisdiction can be changed by proper laws from time to time as the General Assembly may determine.

The power to grant a divorce is a statutory and not a common law power. 14 Cyc., 581; *Olin v. Hungerford*, 10 O. S., 268, 270. It is a judicial power, not legislative. *Bingham v. Miller*, 17 Ohio, 445.

Under Section 1637, General Code, prior to its last amendment, the court of insolvency in Hamilton county had jurisdiction in actions of divorce and alimony concurrent with that of the court of common pleas. When Section 1637 was amended February 17, 1914 (104 O. L., 179), becoming effective May 17, 1914, that jurisdiction was distinctly taken away after December 31, 1914. The language is so explicit that there can be no doubt as to the intention of the Legislature; and this is made more apparent, if that were possible, by the fact that on the same day Section 1639, General Code, was amended to provide for a division of "domestic relations" in the court of common pleas in Hamilton county, in which one of the judges of that court should sit, to whom should be assigned all juvenile court work and all divorce and alimony cases (104 O. L., 176). Under this

1916.]

Hamilton County.

act the common pleas judge to be elected to fill the division of domestic relations would become vested with the power to try such cases at the same time that such power was withdrawn from the insolvency court.

It is argued, however, that no provision was made for the transfer of pending and undisposed of cases, from the insolvency to the common pleas court. That there should be on December 31, 1914, any such pending cases with no provision for transfer, is to be deplored. But it must be noted that this amendment was passed more than ten months before the date fixed for the withdrawal of this jurisdiction. The divorce suit in question here was filed more than six months after its passage and over three months after it became effective. The common pleas court then had concurrent jurisdiction, and the passage of this act must be considered as notice to the members of the bar and the public that a time limit had been fixed for the trial of such actions in the insolvency court. Where parties desired to run no risk of having their proceedings prove abortive because of inability to secure a final decree during the year 1914, they were at liberty to institute such proceedings in the common pleas court where there was a continuing jurisdiction. Such a course was probably anticipated by the General Assembly in providing what it doubtless deemed a sufficient time, before the withdrawal of its jurisdiction, for the disposition by it of divorce cases then pending in the insolvency court.

If the court had been abolished without any provision for transfer of cases to another court, there could have been no contention that it should persist after that time to hear and determine cases until all its pending cases had been tried and adjudged. There is no question but that all of its pending cases would have been terminated and held for naught. The same result would follow the withdrawal of its jurisdiction to hear and determine any particular class of cases, as to such cases.

“Whenever a statute from which a court derives its jurisdiction in particular cases is repealed, the court can not proceed under the repealed statute, even in suits pending at the time of

the repeal, unless they are saved by a clause in the repealing statute. For the effect of the repeal of a statute is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. This rule holds true until the proceedings have reached a final judgment in the court of last resort, for this court, when it comes to pronounce its decision, conforms to the law then existing, and may, therefore, reverse a judgment which was correct when pronounced in the subordinate tribunal whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal. If the only law purporting to confer jurisdiction upon the court to try the case is void, then all the acts of the court are without authority and also void. In such case no intendment of the law, or presumption of fact, can be made in favor of its jurisdiction." (7 R. C. L., 1031.) *Ball v. Tollman*, 135 Cal., 375; *Hunt v. Jennings*, 5 Blackf. (Ind.), 195; *Todd v. Landry*, 12 Am. Dec. (La.), 479, and see note on page 480 and cases there cited.

"The repeal of all statutes relating to divorce deprives the courts of their jurisdiction in divorce actions and terminates their jurisdiction even in pending actions unless the repealing act contains a saving clause." (14 Cyc., 583.) *Grant v. Grant*, 12 S. C., 29.

If the law purporting to confer jurisdiction on the court to try a case is void, no intendment of law or presumption of fact can be made in favor of its jurisdiction. A decree of divorce granted without jurisdiction of the subject-matter is void. *In re Christiansen*, 17 Utah, 412.

It is contended, however, that the general saving clause found in Section 26, General Code, must be considered as applying to all cases for divorce and alimony pending in the insolvency court January 1, 1915, and by reason of that provision it became the duty of that court to hear and determine such pending cases after that date.

Section 26 is as follows:

1916.]

Hamilton County.

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

Many cases are cited by respondent to show the wide application of this act, and there is no doubt that it is applicable to repeals and amendments “unless otherwise expressly provided in the amending or repealing act.”

In the instant case can it be said that it is not expressly provided in the amending act that this jurisdiction shall not exist after a date certain? It is not a mere elimination of the words describing the particular subject-matter in which jurisdiction had been previously given, as might have been accomplished by omitting the words “and actions for divorce and alimony” from clause 9, instead of allowing them to remain and adding the exception in which the jurisdiction is wholly withdrawn after a certain date.

In the opinion of the court there is an express provision which shows that Section 26 was not intended to apply.

The case of *Friend v. Levy*, 76 O. S., 26, is directly in point. The second clause of the syllabus is as follows:

“A general rule of interpretation of statutes is, that when an act of the Legislature is repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it had never existed. This rule is largely superseded by Section 79, Revised Statutes, which provides that: (quoting section); but one Legislature can not prescribe binding rules for the interpretation of the statutes passed by a subsequent Legislature and while in the absence of anything in the statute indicating a different intent the legal presumption is that the Legislature intended the statutory rule to apply, yet when it clearly manifests a different intention the statutory rule does not apply.”

Dabney v. Dabney, 20 App. Cases (Dist. Columbia), 440, is relied upon by respondent as directly in point. In that case an action was brought for divorce on the grounds of wilful desertion and abandonment, the statute then providing for divorce on such grounds, but before the trial the statute was amended to provide for divorce only on the grounds of adultery, after which the trial court sustained a demurrer to the petition and held that it had no jurisdiction to try the case on the charge made because of the change in the law. The case was appealed, and before trial on appeal Congress passed an act providing that all actions for divorce pending at the time the change in the divorce law went into effect might be proceeded with and disposed of under the provisions of the statutes in force previous to that amendment. The majority of the court, acting under this new enabling law, reversed the trial court, while the chief justice, as the minority of the court, held that in his opinion the general saving clause which was similar in terms to our Section 26, General Code, would have applied to permit the trial court to proceed to hear and dispose of the case. We can not regard this minority opinion as authority, but must regard that case as decided by the majority of the court by virtue of the later statute. It must also be observed that divorce jurisdiction had not there been wholly withdrawn from that court, but there had only been a change made in what would constitute legal grounds.

Finding, as we do, that the court of insolvency in Hamilton county is without jurisdiction in actions for divorce and alimony after December 31, 1914, it becomes unnecessary to consider the other ground urged—that it was without jurisdiction in this particular action because the plaintiff had not been a resident of Ohio for the year before the filing of his action.

It might be said, however, that the question raised involves the determination of fact and law which would depend upon the evidence. As already stated, this writ can not be made to serve the purpose of a writ of error to correct in advance possible mistakes of the lower court in deciding questions of law within

1916.]

Hamilton County.

its jurisdiction. It might, however, be possible in a divorce proceeding, where a decree once entered may be claimed to be final notwithstanding error had intervened in the trial, that a case might arise where the facts were so clear and the intention to commit error so avowed that a court of superior jurisdiction might intervene by prohibition. In this case, however, such a situation is not presented. The evidence submitted to this court is not absolutely conclusive as to the plaintiff's residence, nor is it claimed to be identical in every respect with that heard by the court of insolvency. This court would therefore not anticipate in advance of a decision by the trial court, that such decision would not be in accordance with the law and the evidence.

Because of want of jurisdiction of the subject-matter of the action, a writ of prohibition is allowed.

JONES (E. H.), J., and GORMAN, J., concur.

THE WRIT OF PROHIBITION AND ITS PURPOSE.

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF GEORGE T. BERRY, V. WADE
CUSHING, JUDGE OF THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO.

Decided, March, 1915.

*Writ of Prohibition—Nature of the Remedy—When it May be Invoked
—Does Not Lie Against a Common Pleas Judge About to Take
Jurisdiction of an Appeal from the Municipal Court.*

1. The remedy provided by writ of prohibition is for the purpose of restraining the exercise of unlawful judicial power. Resort may be had to this remedy only when there is some officer or person who is about to exercise judicial or quasi judicial power, which is unauthorized, and will result in injury, and against which action no other adequate remedy exists.
2. But inasmuch as the common pleas court has jurisdiction to entertain an appeal from an order by the municipal court overruling a mo-

tion to dissolve an attachment, a writ of prohibition does not lie against a judge about to exercise such jurisdiction.

Burch, Peters & Connolly and Walter D. Murphy, for plaintiffs.

Ralph E. Clark, contra.

JONES (Oliver B.), J.

This is an action praying for a writ of prohibition against one of the judges of the court of common pleas to restrain him from proceeding in a case wherein it is claimed the court of common pleas has no jurisdiction.

In the provision for the court of appeals, made by Section 6, Article IV of the Constitution as amended at the election held September 3, 1912, it was vested, among other powers, with original jurisdiction in prohibition. The Supreme Court is likewise, by Section 2, Article IV of the Constitution as amended, vested with original jurisdiction in prohibition.

It is provided in Section 1475 of the General Code as amended, in cases in the Supreme Court, and in Section 1523 of the General Code as amended, in cases in the court of appeals, that cases in prohibition may be disposed of by the court in advance of their assignment or order on the docket. No provision has been made by statute, by the General Assembly, for actions of prohibition nor, so far as we have been advised, has any other legislation been had with reference thereto.

The office and purpose of a writ of prohibition is well defined and stated in *High's Extraordinary Legal Remedies*, in Section 762, as follows:

“The writ of prohibition may be defined as an extraordinary writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is an original remedial writ, and is the remedy afforded by the common law to correct encroachments of jurisdiction by inferior courts and is used to keep such courts within the limits and bounds prescribed for them by law. The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all

1916.]

Hamilton County.

proper cases should be upheld and encouraged since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law entrusted."

The appropriate function of the remedy is to restrain the exercise of unauthorized judicial power.

Three conditions are necessary to warrant the granting of the relief:

1. That the officer or person against whom it is sought is about to exercise judicial or quasi judicial power.
2. That the exercise of such power is unauthorized by law.
3. That it will result in injury for which no other adequate remedy exists. (High, Section 764a.)

This proceeding arises out of a suit in the Municipal Court of Cincinnati wherein George T. Berry, a resident of Kansas City, Missouri, brought suit against Norman R. O'Neal, a resident of Mena, Arkansas, on an account for professional services rendered to himself and his family. Without any service on the defendant, constructive or otherwise, an order of attachment was issued against the John Shillito Company of Cincinnati, which company answered on the same day stating that it had in its possession money (\$56.25) owing to the defendant. An entry was made August 17, 1914, ordering the John Shillito Company to pay said amount into court, and the case was continued for the purpose of securing constructive notice upon the non-resident defendant, O'Neal, by publication. On August 28, 1914, the defendant appeared in the municipal court, solely for that purpose and moved to discharge the attachment, which motion was granted only as to 90 per cent. of the amount less \$2 for costs of suit. Whereupon the defendant, O'Neal, appearing solely for that purpose, moved to discharge the balance of the money attached and the court overruled said motion. Thereupon the defendant, under Sections 10259 and 10260, General Code, gave notice to the judge of the Municipal Court of Cincinnati that he appealed to the court of common pleas. The

judge, or his clerk, immediately transmitted to the clerk of the Court of Common Pleas of Hamilton County all of the original papers in said case, where it was regularly docketed by the clerk. A motion was then filed by the plaintiff in the common pleas court to dismiss said appeal on the ground that said common pleas court did not have jurisdiction to hear the same. This motion was heard by Wade Cushing, judge of that court and defendant herein, and was overruled, plaintiff excepting. Whereupon plaintiff came to this court praying for a writ of prohibition in this case prohibiting said Wade Cushing as judge of the court of common pleas from proceeding to hear said appeal upon said motion to dissolve the attachment.

It appears, therefore, that the judge against whom the writ of application is sought, has indicated by his refusal to grant the motion to dismiss said appeal, that he is about to exercise judicial power in entertaining such appeal. It is also clear from the consideration of the Cincinnati municipal court act, that his action when taken will not be subject to review and that it therefore might result in injury for which no other adequate remedy than that of prohibition exists. So two of the three conditions necessary to warrant the granting relief as stated above are found to exist—the first and third.

It is therefore necessary to determine whether or not the second condition is also present, that is, whether the exercise of such power is unauthorized by law.

This brings us to the question as to whether there is a writ of appeal under the statutes, in the matter of overruling a motion to dissolve an attachment, from the municipal court to the court of common pleas.

The municipal court, by Section 6 (103 O. L., 280) is given jurisdiction within the limits of the city of Cincinnati:

1. "In all actions and proceedings of which justices of the peace have or may be given jurisdiction."

And by Section 7:

"In all actions or proceedings the municipal court shall have jurisdiction in every ancillary and supplemental proceeding,

1916.]

Hamilton County.

before and after judgment, including attachment of person or property, arrest before judgment, interpleader, aid of execution, and the appointment of a receiver, for which authority is now, or may hereafter be conferred upon the court of common pleas, or a judge thereof, or upon justices of the peace.”

The municipal court, therefore, has jurisdiction of such an action as that from which this proceeding arises. Sections 10259 and 10260 are as follows:

“The defendant may make a motion before the justice to dissolve the attachment, or to release the property, money, or credits attached or garnisheed, either or both. If overruled, it can be appealed by the defendant to the court of common pleas, if in session, or to a judge thereof in vacation, by giving notice to that effect to the justice, but no bond shall be required.

“Upon such notice of appeal being given, the justice shall forthwith transmit to the clerk of the court of common pleas all the original papers. Thereupon within three days from such notice of appeal, or upon such further time as may be for good cause allowed, the court or judge shall hear and determine the motion as though it was originally brought in such court. Upon the final hearing the court or judge shall forthwith transmit the judgment with the original papers to the justice of the peace, which judgment must be entered upon his docket as the final determination of the motion. Such attachment, property, moneys and credits shall be disposed of as directed in the judgment.”

Under Section 10259 the judge of the municipal court had jurisdiction of defendant's motion to dissolve the attachment. This motion was overruled, and by the express terms of this section if overruled it can be appealed by the defendant to the court of common pleas.

Section 10260 confers jurisdiction upon the court of common pleas to hear and determine that motion on appeal and provides what action shall be taken.

The office of justice of the peace is not always filled by a lawyer or one learned in the law, and the purpose of these sections was to provide a speedy review of the question of attachment in a court of record. The Cincinnati municipal court act

provides that the judges of that court shall have been admitted to the practice of the law not less than four years before their election. No doubt, if the act providing for the review of this motion to dissolve the attachment were being framed with reference to the municipal court rather than to the justice of the peace court, it would not have been deemed necessary to provide for a review by the court of common pleas. But the act being general in its terms, and providing for a review upon the overruling of the motion, it must be held from its language to apply to a case in a municipal court as well as to one before a justice of the peace.

In the opinion of this court, therefore, Section 10259 authorizes an appeal to the common pleas court, where the motion to dissolve the attachment made before the municipal court has been overruled, and the judge of the court of common pleas in entering such an appeal is in the exercise of judicial power authorized by law.

The application for a writ of prohibition is therefore denied.

SWING, J., and JONES (E. H.), J., concurs.

1916.]

Belmont County.

**NEGLIGENCE IN PASSING A STANDING STREET CAR WITH
AN AUTOMOBILE.**

Court of Appeals for Belmont County.

**D. D. DuBois, Administrator of the Estate of
William Gitchell v. John H. Schell.***

Decided, May 7, 1915.

*Negligence Per Se—By Driver of Vehicle in Passing Car Discharging or
Receiving Passengers—Contrary to the Provisions of a Prohibitory
Ordinance—Duty of Ordinary Care on the Part of Driver and of
Alighting Passenger Who Was Struck—Charge of Court.*

1. Where a municipal ordinance prohibits drivers of vehicles on a public street from passing a street car while such car is standing, for the purpose of taking on and discharging passengers, it is negligence *per se* for the driver of an automobile to pass such car in disobedience of the provisions of the ordinance.
2. While a passenger alighting from such car is not relieved from the duty of using ordinary care, he has the right to act upon the presumption that drivers of vehicles approaching the car from which he is alighting will obey the law, and if, while using ordinary care himself he is injured by a collision with a vehicle driven past such car in violation of the provisions of the ordinance he can recover.

METCALFE, J.

Briefly stated, the allegations of the petition in this case are that William Gitchell was a passenger upon a street car in the city of Bellaire; that the car had stopped for the purpose of taking on and discharging passengers; that Gitchell alighted from the car; that he passed to the rear of the car intending to cross the tracks and the street to the sidewalk on the other side; that as he passed from the rear of the car onto the driveway he was struck by an automobile driven by the defendant, John H. Schell, and was killed. It is alleged also that there was in force at the time an ordinance of the city of Bellaire

*Affirmed by the Supreme Court, February 29, 1916.

prohibiting the drivers of vehicles upon the streets of said city from driving past a street car which was standing for the purpose of receiving and discharging passengers. The case was tried to a jury and a verdict rendered for the defendant.

The three principal grounds of error relied upon in argument and the brief of counsel are:

First. That the verdict is against the weight of the evidence.

Second. Errors in the charge of the court, and

Third. That the trial judge erred in refusing to charge the jury as requested by the plaintiff in error.

Considering these in their order: As to the first proposition, it is sufficient for us to say that witnesses were called on the part of the plaintiff who testified to the fact that they saw Mr. Gitchell alight from the car, pass to the car's rear, and out upon the street upon the other side of the car, and that he was struck by the automobile when the car was standing; and, upon the other hand, witnesses called by the defendant state that the car had started and had gone on some distance when Gitchell was struck. We think the conflict of testimony is such that the questions of negligence and contributory negligence were purely questions for the jury, and we would not be authorized to set this verdict aside on the ground that it is against the weight of the evidence.

Second. Did the court properly charge the jury? The definition of ordinary care as applied to this case by the trial judge is excepted to. We quote from the charge:

“Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to observe under similar circumstances. That is, ordinary care as applied to the conduct of the defendant in this case is such care as persons of ordinary care and prudence in driving and managing automobiles in the streets of a city are accustomed to exercise and observe for the protection of persons traveling in the streets; and ordinary care, as applied to the deceased, William Gitchell, in this case is such care as persons of ordinary care and prudence observe in crossing streets at street crossings, to avoid danger and injury to themselves arising from the driving of automobiles through the streets.”

1916.]

Belmont County.

That is to say, the degree of care required of the defendant is such only as would be required of an automobile driver approaching a street crossing, regardless of the fact that a street car might be standing at the crossing receiving and discharging passengers, and also regardless of the fact that a municipal ordinance prohibited him from driving past the car while so standing. With regard to the ordinance, the trial judge said to the jury:

“While this ordinance has been introduced in evidence, and while the plaintiff claims that the same was violated by the defendant, which he denies, neither the ordinance itself nor its violation, if the same has been proven, is sufficient, in and of itself to establish the claim of the plaintiff that the defendant was guilty of negligence, but such ordinance, and the testimony tending to show its violation, if any, may be considered by you as circumstances tending to prove negligence.”

And again, in another part of the charge this:

“You are instructed that, under the law, if a person goes unexpectedly in front of a moving automobile which is being prudently managed and controlled by the driver, that, is, that ordinary care is being used by the driver who is unable by the exercise of ordinary care and prudence to avoid injuring or killing such person, the driver is not liable. He is only liable in such circumstances if he fails to observe ordinary care and prudence in the management and control of his car, and by reason of such failure causes a collision.”

The last quoted part of the charge may be correct as applied purely to the defendant's contention, but viewed in the light of other parts of the charge we think it is very misleading.

The plaintiff claims that the defendant, at the time his automobile struck the decedent, was violating an ordinance of the city of Bellaire, and that by reason of the violation of that ordinance the defendant was killed. Upon that question the trial judge said to the jury that they might consider the ordinance and any evidence tending to show its violation as evidence tending to prove negligence, and in effect stated that the viola-

tion of the ordinance was not negligence of itself. That is to say an automobile driver, under the circumstances of this case, is charged only with the duty of ordinary care, and ordinary care is all that is required of him in passing a street car at a stop for the purpose of discharging passengers. No distinction is made as to where that ordinary care should be exercised, or whether the degree of care would be higher in one place than another. This, it seems to us, ignores the provisions of the ordinance and would allow the defendant to drive his automobile past the standing car in contravention of its provisions, with only the duty resting upon him of using ordinary care, and relieve him entirely from obedience to its provisions. We can not think that this is the law. The ordinance means what it says, and the safety of the public requires an obedience to its provisions. The decedent had a right to suppose that the defendant would obey the law, and using ordinary care himself to act upon that supposition; and the plaintiff had a right to have his theory of the case correctly stated to the jury, and if the jury found that the defendant did drive past the car in violation of the ordinance that such action was negligence on his part. And if, in consequence of that fact the plaintiff's decedent was injured while using ordinary care himself, the plaintiff would have a right to recover.

The jury under this charge had a right to understand that the trial judge's definition of ordinary care was as applicable to the claim of the plaintiff as to that of the defendant, and that the defendant might pass the standing car disregarding the ordinance entirely, and that when the decedent got off the car it was his duty to look for an approaching automobile, and if he did not do so he would be guilty of contributory negligence.

There could be no error in this case for the refusal of the trial judge to give the requests numbers one and two preferred by the plaintiff. The fact that the plaintiff's decedent was struck while the car was standing was disputed. While they state the law correctly, as applied solely to the plaintiff's contention, they, in effect, assume that that contention was undis-

1916.]

Belmont County.

puted, and for that reason we think there was no error in a refusal to give them.

Probably the trial judge was misled in this case by a misconception of the case of *Meek v. Pennsylvania Company*, 38 O. S., 632. In that case the city ordinance was not plead as a ground of negligence, but the court held that the plaintiff had a right to introduce it in evidence in support of the allegation of negligence in the petition, not as a foundation for recovery, but as a circumstance tending to show negligence. We think the case of *Baker v. Pendergast*, 32 O. S., 494, correctly states the law as applied to this case:

“A person about to cross the street of a city in which there is an ordinance against fast driving has a right to presume in the absence of knowledge to the contrary that others will respect and conform to such ordinance. And it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons.”

A good statement of the law also is found in 8 *Thompson on Negligence*, Section 10:

“When any specific act or dereliction is so universally wrongful as to attract the attention of the law-making power, and this concrete wrong is expressly prohibited by law or by ordinance, a violation of this law, a commission of the specific act forbidden is for civil purposes correctly called negligence *per se*.”

For errors in the charge of the court as above pointed out, the judgment in this case is reversed.

SPENCE, J., and POLLOCK, J., concur.

**DETERMINATION AS TO WHEN A CASE FAILED OTHERWISE
THAN ON THE MERITS.**

Court of Appeals for Hamilton County.

WILLIAM E. HUTTON ET AL V. WILLIAM S. CURRY.*

Decided, March 22, 1915.

*Res Adjudicata—Relitigation of Question as to When a Case Failed
Otherwise than on the Merits Can Not be Had, When.*

When a court of last resort has decided that an action has failed otherwise than on its merits on a certain date, and it is sought by averments in an answer to the action to show that the former action failed otherwise than on its merits on a different date from that found by the court of last resort, the fact as to when the action failed otherwise than on its merits can not be relitigated under the averments of the answer, as that question is *res adjudicata*, and the averments of the answer which seek to raise that question again, are properly stricken from the pleading on motion.

Ernst, Cassatt & Cottle, for plaintiffs in error.
Thos. L. Michie, contra.

GORMAN, J.

The first assignment of error alleged by counsel for plaintiff in error is that the court below erred in granting the motion to strike from the answer the averments of the second defense.

The record shows that in February, 1904, the plaintiff's action in the former case was dismissed, and in April, 1904, this entry of dismissal was set aside because, as set out in the entry, the entry of dismissal was made by inadvertence and mistake. Then on April 21, 1906, the court found that the entry of April, 1904, setting aside the entry of dismissal, was made without notice

*Judgment modified by the Supreme Court, January 25, 1916, but not on this point decided.

1916.]

Hamilton County.

to or knowledge of defendants after term, and was irregular and void, and set aside said entry of April 29, 1904.

Upon this state of facts on a demurrer to the petition the general term of the superior court and the Supreme Court, by an equally divided court, held that within the meaning of Section 11233 of the General Code the plaintiff in the former case failed otherwise than on the merits at the date of the last entry made by the superior court in special term, to-wit, on April 21, 1906.

This ruling we believe is final and conclusive in this case, and binds this court as to the time when plaintiff failed in the former action otherwise than upon the merits; and this present action having been commenced within one year from April 21, 1906, was brought within time and is not barred.

The theory upon which the general term of the superior court so held is that when the entry of April, 1904, setting aside the entry of dismissal, was made, the former action was then and thereby reinstated as a pending untried case and so continued until April 21, 1906, when the superior court in special term set aside the entry of April, 1904, because the same was made without notice and was therefore irregular and void, at which time the plaintiff's cause failed otherwise than upon the merits. It failed because of the last action taken by the special term of the superior court on April 21, 1906, and not by reason of the dismissal in February, 1904. If this last entry of April 21, 1906, had not been made, then manifestly the plaintiff would have been enabled to proceed with his former case and prosecute it to a final judgment on the merits; but by reason of the court's entry of April 21, 1906, he was then and thereby precluded from prosecuting his action to a final determination on the merits, and we are of the opinion that the general term of the superior court did not err in finding that this date, April 21, 1906, was the time when the plaintiff failed otherwise than on the merits of his case.

Now after the case had been taken to the general term and to the Supreme Court, and this point decided adversely to the

contention of plaintiffs, they set up in a second defense of an answer, certain averments to the effect that the superior court in special term, in the usual course of business after due and regular notice in the *Court Index*, a daily law journal of general circulation especially among the lawyers, and upon a call of the former case for trial regularly and plaintiff having failed to appear, dismissed the cause without record and without prejudice, and held that the entry of April, 1904, was made without notice to counsel for defendants and was therefore null and void because so made after the term. Upon motion all the averments of this second defense were stricken from the answer by the court below on the grounds that the matters therein set up had been adjudicated in the rulings on the demurrer to the petition by the general term of the superior court and the Supreme Court.

Now the power of the special term of the superior court to dismiss the plaintiff's former action in February, 1904, for want of prosecution was not drawn in question. It was only claimed that it was made inadvertently and by mistake. Whether this entry was made inadvertently and by mistake, or not, there is no doubt of the court's power and right to set it aside during the term at which it was made (Section 11586). Therefore it was not material under what circumstances this entry was made in the former case. The sole question is as to the jurisdiction or power of the court below to make the entry of April 29, 1904, setting aside the entry of dismissal of February, 1904, after the term at which the entry of dismissal was made, the superior court of Cincinnati having a term every month.

By the provisions of Section 11631, General Code, Sub. 3, the court had power to set aside the judgment of dismissal after the term, for mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment. Proceedings to correct mistakes shall be by motion, upon reasonable notice to the adverse party or his attorney (Section 11634). Now it appears by the record of the case, in the last entry, made April 21, 1906, that this entry of April, 1904, was made without notice and therefore was irregular and void. The effect of proving all the allegations

1916.]

Hamilton County.

in the second defense of defendants' answer would be to establish the fact that the second entry was made without notice and was therefore null and void. Nothing more than the establishment of these facts could be of any benefit to defendants. But these facts are already found in the entry of April 21, 1906. So that it would appear that all these averments in the answer relate to and touch a matter already adjudicated, and therefore these matters were *res adjudicata*. Evidently the learned judge who granted the motion to strike out these averments of the second defense was of the opinion that the proof of all the facts set out in this defense of the answer would not avail the defendants or affect the issues then left in the case.

The fact remained that the former action failed otherwise than upon the merits on April 21, 1906. This does not mean that the action was then dismissed, but by this entry plaintiff was precluded from proceeding with his action.

We are of the opinion, in view of what was settled by the ruling on the demurrer to the petition, that the matters contained in the second defense of the answer were adjudicated and the court did not err in striking from the answer these averments.

We find no error in the admission or exclusion of evidence, or in the charge of the court, and no errors which would justify a reversal of the judgment. We think the verdict is sustained by the evidence, and the judgment will therefore be affirmed.

JONES (E. H.), P. J., concurs; JONES (Oliver B.), J., dissents.

JONES (Oliver B.), J., dissenting.

In my opinion, the first case of the plaintiff failed when it was dismissed February 17, 1904. The defendants had no notice of subsequent proceedings and were never in court in that case after the February term in which that dismissal was entered. The entry of April 19, 1904, was void and therefore of no effect in continuing the case, and was so held by the entry of April 21, 1906, which did not itself terminate the case, but simply expunged the previous entry and found that the case had been

finally dismissed February 17, 1904. The last entry was not the final failure of the case, but declared when it had failed.

The demurrer to the petition was overruled by the general term of the superior court in a majority opinion, which found that sufficient facts were not set out to show the validity of the original entry of dismissal. Defendants sought to bring these facts before the court by the allegations in the second defense of its answer. In my opinion the trial court erred in striking out this second defense, and the petition in this case was filed too late.

APPEAL BY A GUARDIAN.

Court of Appeals for Knox County.

IN THE MATTER OF THE GUARDIANSHIP OF
CHARITY ANN ROBINSON.*

Decided, October Term, 1915.

Guardian and Ward—Right of Guardian to Appeal from Order Terminating Guardianship—Bond Not Required of Guardian.

1. A guardian has the right of appeal from an order by the probate court terminating the guardianship.
2. Such an order does not terminate the guardianship absolutely, until the right of appeal or any other statutory rights have lapsed; and inasmuch as it must be assumed that the guardian has no personal interest in the appeal, it will be regarded as taken in the interest of the trust and an appeal bond can not be required.

Robert L. Carr and L. C. Stillwell, for guardian.

F. O. Levering, D. B. Rawlins and S. M. Crouch, contra.

*Motion to require the Court of Appeals to certify its record in this case overruled December 7, 1915. The opinion below, which is here reversed, appears in 18 N.P.(N.S.), 286, with the action of the Supreme Court stated but with the action of the Court of Appeals omitted through an oversight.

1916.]

Knox County.

BY THE COURT (Shields, Powell and Houck, JJ.).

The question presented in this case for adjudication arises as follows:

Charity Ann Robinson was adjudged an imbecile in the probate court of this county, and a guardian was appointed for her some time in the year 1913. After various motions had been filed and disposed of the said Charity Ann Robinson filed a motion in the probate court, on the 9th day of February, 1915, for the termination of the guardianship, which motion was finally heard and disposed of March 15th, 1915, and on that date the judge of the probate court entered an order in which he declared the guardianship of said Charity Ann Robinson terminated, and ordered her guardian to file an account, as required by Section 11010 of the General Code. Afterward, within the time prescribed by law for that purpose, the guardian filed a notice of his intention to appeal from the order of the probate court to the court of common pleas. No bond was filed by the guardian to perfect such appeal.

A motion was then filed by Charity Ann Robinson, in the court of common pleas, to dismiss the appeal upon two principal grounds: first, that the order from which an appeal was attempted to be taken was not appealable; second, that if the same was appealable the guardian in attempting to appeal should have filed a bond, as it was not an appeal in the interest of his trust as such guardian. This motion was heard in the court of common pleas and sustained, and the appeal was dismissed; whereupon this proceeding in error was commenced in this court to reverse the judgment of the court of common pleas.

It is insisted in argument upon the part of Charity Ann Robinson that the probate court has final jurisdiction in the matter of terminating guardianship, and having such final jurisdiction the case was not appealable. The court is of the opinion, under the authority of the 45th Ohio State, at page 702, that the cause is appealable. In the case cited application was made by a ward who had been adjudged an imbecile that an order be entered terminating such guardianship, on the ground mentioned

in the statute, namely: that the order was improperly made in the first instance; or, if not so, then that the ward had been restored to reason. The motion in that case was overruled, and an appeal taken by the ward, and the court sustained the right of appeal; and it is difficult for this court to see how, if the case was appealable as to one party, it would not also be appealable by another party who might be affected by such order. In other words, the ward alone is not the only party to a proceeding of that kind, although no provision is made for notice to any other parties; but as the effect of such an order is to remove and discharge the guardian he would be a party affected thereby, and therefore would have the right of appeal.

More difficulty has been experienced by the court as to whether or not an appeal taken by the guardian upon a notice in writing merely, as provided by the statute for the appeal of parties who appeal in the interest of their trust, would apply in cases of this kind, or whether the guardian or other person attempting to appeal should give a bond. Upon consideration of the matter the court has arrived at the conclusion that a guardian has no personal interest in the matter of the guardianship, or at least ought not to have, and that if an appeal is taken it is taken only in the interest of the trust. It is contended, however, that the trust terminates with the order, and therefore no appeal can be taken in the interest of the trust. But we think that an order terminating the guardianship does not terminate it absolutely until the right of appeal or any other statutory rights that might attach thereto have terminated, and that such right would exist without regard to the absolute character of the order terminating the guardianship made in the probate court.

Viewing this case as we do, the court thinks that the judgment of the court of common pleas dismissing the appeal was erroneous and should be reversed, and the cause should be remanded to the court of common pleas for hearing upon the merits of the motion to terminate such guardianship.

Exceptions may be noted.

1916.]

Hamilton County.

**DAMAGES FOR DEATH OF A CHILD STRUCK BY AN
AUTOMOBILE.**

Court of Appeals for Hamilton County.

**CHARLES EISEN V. BERTHA HALLORAN, ADMINISTRATRIX OF THE
ESTATE OF RUTH HALLORAN, DECEASED.**

Decided, January 16, 1915.

*Negligence—Child Killed by Automobile—Responsibility of Mother for
Negligence of Those in Whose Custody the Child Had Been Placed
—Charge of Court—Errors Rendered Unprejudicial by the Facts
of the Case.*

In an action by a mother for damages on account of the death of her four year old child, for which she sues as administratrix, it is error to refuse to give a special charge, requested by the defendant before argument, to the effect that the said mother was responsible for the act of those in whose custody she had placed the child; and if it appear from the evidence that they failed to exercise ordinary care for the safety of the child under the circumstances, damages can not be recovered by the mother for her own benefit; but such an error is not prejudicial where the same principle of law was incorporated in the general charge and the evidence fails to show any negligence on the part of the mother or those in whose custody she had left the child.

Waite & Schindel, for plaintiff in error.

Galvin & Bauer, contra.

JONES (E. H.), J.

In the court below a judgment was recovered for \$4,000 for the death of Ruth Halloran, four years of age, caused by being struck by an automobile owned and driven by the plaintiff in error.

Elaborate briefs have been filed by counsel for the parties, and the arguments there advanced have been carefully considered. Some of the errors complained of arise from a mistake

or misunderstanding on the part of counsel for plaintiff in error as to the contents or import of the pleadings. The language of the petition justifies the action of the trial court in charging the jury upon the doctrine of "last chance;" and the answer to the petition, in the second defense stated therein, charges the mother of the child, Bertha Halloran, with negligence. So that the alleged errors pointed out by counsel for plaintiff in error in his brief, relating to the action of the court in charging the jury upon these issues, are not well taken.

In three instances however, to which our attention is called, the trial court erred, although after much discussion we have reached the conclusion that the errors were not prejudicial.

The court erred, first, in refusing to give special charge No. 5, requested by defendant, as follows:

"I charge you that the mother, Bertha Halloran, was responsible for the acts of Herbert and Irene Becker, in whose custody the deceased Ruth Halloran was left, and if you find from the evidence that they failed to exercise ordinary care under the circumstances for Ruth's safety, the plaintiff can not recover any damages for the benefit of said Bertha Halloran."

Second, the court erred in failing to charge (quoting from the brief):

"That if the evidence of plaintiff raises a presumption of contributory negligence the burden rests upon her to remove that presumption, and it is only after that presumption is removed that the burden of proving contributory negligence rests upon the defendant."

Third, it was error for the court to admit in evidence statements of witnesses that a few hours after the death of the child, while at the home of the mother, a statement was made by Mr. Neuzel in the presence of Mr. Eisen, plaintiff in error, as follows: "I will admit that we were running awfully fast;" and the further statement of said witnesses, "Mr. Eisen stood silently and made no response to said statement."

With reference to the first error, we have to say that the court included the proposition of law therein contained in its general

1916.]

Hamilton County.

charge; and although the party requesting the charge was entitled to have it given before argument, we can not see that the failure to do so was prejudicial, in view of the subsequent action of the court in incorporating it in the general charge. Were this a case where the question of the negligence of the custodians was by the record placed in doubt, a different question would be presented, but a careful scrutiny of the transcript of the evidence before us in this case fails to show proof of any act of negligence on the part of the mother or those in whose custody the child was at the time. The word "negligence" is here used in its legal sense. We do not mean to find, as a matter of law, that the custodians exercised at the time the highest possible degree of care. It is not necessary to so find. The right of recovery depended only upon the exercise of ordinary care on their part. The jury could not have justly found in this case that there was any lack of ordinary care on the part of either the mother or Mr. and Mrs. Becker, aunt and uncle of the child, with whom she had temporarily left the child.

Again, the purpose of a special charge given at the request of counsel before argument is to acquaint counsel with the view entertained by the court upon the law of the case so that he may be guided in the presentation of the case to the jury. The principle covered by the charge requested is so interwoven into this case, and necessarily involved, that we can not conceive how the refusal of the court to give the charge when requested would have any effect upon the argument.

The second error committed by the court, as before found, is held to be not prejudicial for the reason first assigned above with reference to special charge No. 5. There was no want of ordinary care on the part of the mother or her agents shown by the record in this case, much less is there any presumption of negligence, on the part of them, raised by the evidence of plaintiff's witnesses. In this view of the record, we are of the opinion that this error would not justify a reversal of the judgment below.

As to the third error, relating to the admission of evidence, we make the same finding, viz., that it was not prejudicial. Inde-

pendently of this evidence we are convinced that it is sufficiently shown that the accident was in no wise due to the negligence of the mother or her agents, but was caused by failure to exercise the proper degree of care required on the part of the driver of the machine.

It is argued that the judgment of \$4,000 is excessive. Many cases are referred to in the briefs on both sides showing acts of courts in passing upon the amounts of verdicts in similar cases. We are satisfied that the verdict is larger than is generally awarded for the death of a child of such tender years. The many cases cited show it to be above the average in amount, but we can not say that it is so much so as to warrant a reduction or reversal.

Upon an examination of the entire case including the facts and the law, it appears that substantial justice has been done and the judgment will be affirmed.

JONES (Oliver B.), J., concurs; SWING, P. J., dissents as to the amount of the judgment, deeming it excessive beyond reason.

1916.]

Hamilton County.

**RIGHT TO DISMISS WITHOUT PREJUDICE EXISTS UP TO
FINAL SUBMISSION.**

Court of Appeals for Hamilton County.

THE CINCINNATI CAR COMPANY V. CHRIS SNYDER.

Decided, May 3, 1915.

Trial—Argument on Motion for an Instructed Verdict—Followed by Motion for Withdrawal of a Juror and a Continuance— And Still Later by the Granting of a Motion to Dismiss Without Prejudice— Final Order—Discretion of Court.

1. The withdrawal of a juror and granting of a motion to continue the cause, after a motion to instruct the jury to return a verdict for the defendant had been argued in part but before it had been submitted to the court or any intimation had been given as to what its decision would be, is not an order affecting a substantial right, and a proceeding in error based thereon does not lie.
2. The right to dismiss without prejudice exists up to final submission of the cause to the court or jury, and dismissal at the time it was granted in the present case was within the discretion of the court, and was not prejudicial to the rights of the defendant whose motion for an instructed verdict was as yet undetermined.

George H. Warrington and Robert S. Marx, for plaintiff in error.

Littleford, James, Ballard & Frost, contra.

GORMAN, J.

This was an action to recover damages for personal injuries claimed by defendant in error to have been sustained by reason of the negligent acts of his employer, the plaintiff in error. On the trial in the court of common pleas, at the close of plaintiff's evidence and when he had rested his case, the defendant moved the court to instruct the jury to return a verdict for defendant; and after the motion had been partly argued and before the court had announced any decision thereon, plaintiff moved that a juror be withdrawn and the cause be continued, which motion was granted, to which action of the court defendant excepted.

Thereupon an entry was made upon the journal ordering a juror to be withdrawn and the cause continued at the cost of the plaintiff. To all of which the defendant excepted. The jury was discharged from further consideration of the cause. The motion to instruct the jury to return a verdict for defendant was never disposed of. Within three days a motion was filed by the defendant to set aside this continuance and for a judgment on the pleadings and the evidence. This motion, so far as appears from the record, has never been passed upon.

A bill of exceptions was taken and filed, embodying all the evidence adduced; and it appears from statements in the bill of exceptions that all the jurors, the parties and their counsel, were present and able to proceed with the hearing of the cause when the court withdrew a juror and continued the case; that defendant did not consent to this action of the court, but objected and excepted thereto, and insisted upon the court passing upon the motion to instruct the jury to return a verdict in its favor, and that it was ready, and willing, and anxious to proceed with the hearing of the cause if the motion should be overruled.

On April 3, 1914, four and one-half months after the date of the entry withdrawing a juror and continuing the case, plaintiff on his own motion and by leave of court voluntarily dismissed his action, without prejudice, at his own costs. To all of which the defendant excepted.

This is the last entry on the journal.

The bill of exceptions, original papers and a transcript of the docket and journal entries are filed in this court with a petition in error, and this court is now asked to reverse said judgment of dismissal without prejudice, and that a judgment dismissing plaintiff's action be entered in this court.

Numerous grounds of error are set out in the petition in error, but the chief errors relied upon are: the failure of the trial court to grant defendant's motion to instruct a verdict for defendant; the granting of plaintiff's motion to withdraw a juror and continue the case; the refusal of the court to grant defendant's motion to set aside the entry withdrawing a juror; and the granting of permission to plaintiff to dismiss his action without prejudice.

1916.]

Hamilton County.

The error is prosecuted to the entry dismissing the action without prejudice. This, it is claimed, is a final order and error may be prosecuted thereto. Ordinarily plaintiff has the right, under favor of Section 11586, General Code, to dismiss his action without prejudice to a future action, provided he does so before its final submission to the jury or to the court when the trial is by the court. In such a case, although the entry of dismissal be considered a final order, no error lies to the dismissal because no prejudice results to the defendant from such a judgment, but it is only when the final order or judgment is prejudicial to the complaining party will a reviewing court reverse the judgment or order however erroneous it may be.

The majority of the court are of the opinion that the entry of dismissal in this case is not a final order entitling the defendant below to prosecute error therefrom, for the reason that the dismissal of the cause without the court passing upon its motion to instruct the jury to return a verdict in its favor was not prejudicial to it.

A final order, as defined in Section 12258, General Code, which may be vacated, modified or reversed, is:

“An order affecting a substantial right in an action, when in effect it determines the action and prevents a judgment,” etc.

This entry of dismissal undoubtedly determined this action below; and it is claimed by plaintiff in error that it prevented a judgment in its favor.

This contention of the plaintiff in error that the dismissal prevented a judgment in its favor, we think is an unwarranted assumption on its part; *non constat* but that the trial court would have overruled the motion of defendant for an instructed verdict, and on the final submission of the case to the jury a verdict might have been returned in favor of plaintiff and a judgment entered thereon. The record does not disclose how the trial court would have ruled. Reference is made to an opinion of the trial court announced some time after the case was dismissed by plaintiff without prejudice, and what purports to be a copy of this opinion is attached to a supplemental petition in error filed by plaintiff in error, but this opinion is no part of the record,

nor is the language of the court found embodied any place in the record. We can not consider this opinion as a part of the record. It purports to be a decision on the motion to set aside the entry withdrawing a juror and for judgment in favor of defendant and granting leave to plaintiff to dismiss his action without prejudice. There are no journal entries as to any matters passed upon in this opinion except the entry of dismissal without prejudice. We are not at liberty to presume or assume, in the absence of any record to that effect, that the defendant would have had an instructed verdict but for the withdrawal of a juror and the dismissal of the cause without prejudice.

The only cause of complaint which plaintiff in error can fairly make, by reason of the court's actions in withdrawing a juror, and later in allowing plaintiff to dismiss without prejudice, is that it may be put to the additional cost, expense, trouble and time of defending another action brought by plaintiff; but this would be as probable if plaintiff had dismissed without prejudice at the close of his case before a motion had been made by defendant for an instructed verdict.

It is claimed that the court had no right to withdraw a juror and continue the case after the jury had been impaneled and the case had proceeded to trial, except by consent of parties, or because of sickness of a juror, or accident or calamity, or after the jurors have been kept together until it satisfactorily appears that there is no probability of their agreeing, and Sections 11453 and 11454, General Code, and the case of *Rau v. Risiden*, 11 C.C. (N.S.), 255, are cited in support of this contention.

We are of the opinion that Section 11453 does not embrace all the cases in which a continuance may be had after the commencement of a jury trial, nor does the code prohibit the practice of withdrawing a juror and continuing a cause when in the opinion of the court justice requires this to be done. This practice has been resorted to from time immemorial, not only in this state but in many other states, and in the federal courts as well as in the courts of Great Britain and her colonies.

“Withdrawing a juror: A fiction to which the court may resort when it appears that owing to some accident or surprise, de-

1916.]

Hamilton County.

fect of proof, unexpected and difficult questions of law, or like reason, a trial can not proceed without injustice to a party." Cyc. Vol. 40, p. 2126.

"The withdrawal of a juror by direction or leave of court produces a mistrial and effects a continuance; and it is error when a party had been permitted to withdraw a juror, to enter judgment against him on the merits." Cyc. Vol. 38, p. 1593; *Planer v. Smith*, 40 Wis., 31.

In the above case the court, after granting plaintiff's motion to withdraw a juror, dismissed the plaintiff's action and gave judgment for defendant, instead of continuing the case; and it was held that this was error, and that the only judgment which could have been properly entered was a non-suit, which would not be a bar to another action for the same cause; in other words, a dismissal without prejudice.

"A motion to withdraw a juror must be based on matters occurring at the trial; the granting of the motion being in the discretion of the court, which discretion is subject to review only in cases of abuse." Abbott's Civil Jury Trials, 3d. Ed., pp. 487 to 494 inclusive; *Schofield v. Settley*, 31 Ill., 515; *Huntington v. Toledo, St. L. & W. R. R. Co.*, 99 C. C. A., 157; *Benson v. Altoona & L. Ry. Co.*, 228 Pa. St., 290; *Adler v. Lesser*, 110 N. Y. Sup., 196; *Morrison v. Hendenberg*, 138 Ill., 22; and many other cases that might be cited.

A juror may be withdrawn where it is necessary to prevent the defeat of justice. *Wolcott v. Studebaker*, 34 Fed., 8.

In the case at bar the plaintiff's counsel asked leave to file an amended petition, which we think the court might and should have granted, but because of the objection of counsel for the defendant, the court held that he had no right to grant leave to file the amended petition. It was then that counsel for plaintiff asked and obtained leave to withdraw a juror and continue the case, manifestly for the purpose of more fully preparing plaintiff's case and amending the pleadings. This we think the court had the discretion to permit. *Miller v. Metzfer*, 16 Ill., 390; *Messenger v. Fourth Nat. Bk.*, 6 Daly, 190.

We are of the opinion that, under the circumstances shown by the record in this case, the court did not abuse its discretion

in permitting a juror to be withdrawn and a continuance of the case.

The case of *Rau v. Risiden*, 11 C.C.(N.S.), 255, which denied the right of the trial court to discharge the jury in a civil action during the trial, unless based on the finding of some necessity therefor, or upon consent of parties, was overruled by the Supreme Court without report, because the order was not a final one within the meaning of the statute. *Rau v. Risiden*, 81 O. S., 538.

In any event, the effect of withdrawing a juror operated merely as a continuance of the case; the order was not a final one; it rested in the sound discretion of the court, and no abuse of discretion is shown by the record; no judgment had then been pronounced in defendant's favor; nor, as we view the record, can it be said that defendant was entitled to an instructed verdict; at least the trial court has never so declared. No prejudice resulted to plaintiff in error because of this action of the court.

As to the dismissal of plaintiff's case without prejudice at the time it was done, we hold that the plaintiff had the right to do so up to the time the case was finally submitted either to the court or jury. A motion had been made to instruct the jury for defendant and this motion was partly argued; but while being argued, and before submission to the court, and before any intimation had been given by the court as to how he would rule thereon, and before any announcement was made of the court's decision on this motion, the plaintiff dismissed his action without prejudice. In fact, the court, on the record, has not yet passed upon that motion to instruct. This is one of the grounds of complaint by plaintiff in error that the court has not yet granted its motion or given a judgment in its favor.

The cases of *Turner v. Pope Motor Car Co.*, 79 O. S., 153, and *L. S. E. Ry. Co. v. Sanders*, 19 C.C.(N.S.), 21, are distinguishable from the instant case in that, in both of these cases it was sought to dismiss the plaintiff's action after a motion for an instructed verdict for defendant had been made, argued, decided, and granted by the court. The request in each of these cases to dismiss without prejudice came too late—after

1916.]

Hamilton County.

the court had announced its opinion and after final submission to the court—whereas under the statute, Section 11586, General Code, the right to dismiss without prejudice exists only up to the time of final submission. As was said by Judge Price, in the case of *Turner v. Pope, etc., supra*, at pages 167-168:

“We again say that the finding and judgment of the court on the motion is the determining authority, and the directed verdict is in compliance with the forms of practice.”

See also *Bee Bldg. Co. v. Dalton*, 68 Neb., 38; *Morrissey v. R'y Co.*, 80 Ia., 314.

There being no errors in the record prejudicial to plaintiff in error, the judgment of the court of common pleas dismissing the plaintiff's action without prejudice is affirmed.

JONES (Oliver B.), J., concurs in judgment of affirmance.

JONES (E. H.), P. J.:

Acting under authority of Section 11586, General Code, plaintiff below dismissed his action “before its final submission to the jury.” There had been no decision upon the motion for an instructed verdict, nor had any opinion been formed or expressed by the trial judge. Under these conditions plaintiff had the right to dismiss “without prejudice,” and the authorities relied upon by counsel for plaintiff in error do not fit this case. There is no order or judgment of which he may complain in a court of review, and no showing by the record that a judgment in his favor was prevented or forestalled by the dismissal.

The petition herein contains the necessary jurisdictional averment in a proceeding such as this, to-wit:

“A final order was made by said court of common pleas determining said action and preventing a judgment therein.”

This must mean that a judgment for plaintiff in error was prevented by the voluntary dismissal of the action by plaintiff below. There is nothing in the record to support this averment.

Hence plaintiff in error was not hurt by the order complained of. It was not deprived of any right nor was it the victim of any wrong, and it can not be heard to complain in a court of error.

The petition in error should therefore be dismissed.

ACTION FOR CONTRIBUTION FROM A CO-SURETY.

Court of Appeals for Logan County.

WILSON McADAMS v. J. W. DUNSON.

Decided, August 10, 1915.

Sureties—Contribution Among—Notice of Payment or Demand Not Condition Precedent to Right of Recovery.

1. A surety who has paid more than his ratable share of a debt, is entitled to contribution from a co-surety, without averring or proving notice, or demand of payment.
2. In an action for contribution where the only relief sought is a judgment for money, costs are recoverable by plaintiff, as of right, under Section 11624, General Code.

John P. Bower and James Kernan, for plaintiff in error.
Howenstine & Huston, contra.

CROW, J.

Error to the court of common pleas.

Plaintiff in error, who was plaintiff in the court of common pleas, sought recovery from defendant in error, who was defendant below, by way of contribution, because of payments made by plaintiff, of the entire amount of two promissory notes upon which defendant and plaintiff were sureties.

The cause was tried to a jury, and at the close of plaintiff's case, on motion of defendant, a directed verdict was returned for him. Judgment was accordingly entered in defendant's favor.

The evidence tends to prove all the essential elements requisite to plaintiff's right to recover, excepting (if such be an essen-

1916.]

Logan County.

tial element) notice to defendant, of said two several payments, or demand on him for contribution, prior to commencement of plaintiff's action.

The trial judge held such demand to be necessary, and for lack of evidence tending to prove same (and for no other reason), directed the verdict, as above stated.

The only question for determination in the present case is, therefore, the correctness of that action.

There are but three reported cases in Ohio, which either directly or remotely bear on the point.

These will be taken up in their order.

In 5 Ohio, 444, the material facts were as follows:

Edward Williams and Isaac Williams were makers of a joint and several bond, to one Heath. After its maturity, and more than six years prior to commencement of the suit, Edward Williams paid more than one-half the principal and interest then due, such payment being referred to in the opinion, as "a small sum.

Several years thereafter the obligee, Heath, brought suit on the bond for the unpaid balance, against Edward Williams and Isaac Williams, and recovered judgment against both. Soon after rendition of the judgment Isaac Williams died, and Edward Williams paid the whole of same.

For recovery of one-half of said two payments with interest, Edward Williams' administrators sued Isaac Williams' administrators.

The defenses were *non assumpsit*, and *non assumpsit within six years*.

The questions presented by the issues, so far as here pertinent, are: (1) applicability of the statute of limitations; (2) if applicable, the time from which it begins to run, whether from the date of each payment of a part, or from the time payment of the whole sum only, or from maturity of the original instrument of obligation upon which the parties were bound; and, (3) whether the action accrues until notice has been given, or demand has been made.

The court held: (1) that the transaction involved no element of trust, and that the statute of (six years) limitation applied;

and (2) and (3) that in cases where the co-obligor has paid in small installments, he can not, without prior notice or demand, maintain a suit for each sum so paid.

It is worthy of notice, that no fact appears which would seem to call for any comment regarding "small installments," as there were but two payments the first of which was more than one-half the total amount then due on the obligation, and the other covering the whole of the remaining sum.

It should also be observed that at page 447, "other payments" are spoken of in obvious reference to the one payment of the judgment covering said remaining sum.

While the case nowhere either in the statement of facts or the opinion, specifically discloses whether notice was given, or demand made, between the dates of payment of the judgment, and commencement of plaintiff's suit, we are constrained to assume that the court considered and decided the case on the theory of absence of such notice or demand in view of the discussion of point 4 on page 446 and the language of paragraphs three and four of the syllabus.

Hence that case must be regarded as supporting the contention that no notice of payment need be given, nor demand made, before commencement of suit.

The case of *Carpenter v. Kelley*, 9 Ohio, 106, is, however, a direct authority in complete opposition to the above contention, so far at least as relates to the matter of giving notice to a co-surety, of payment. The syllabus is thus restricted, and the learned judge who delivered the opinion, construed at page 108, the issue of lack of demand to be the equivalent of want of notice of payment.

No case is referred to, other than 5 Ohio, 446, *supra*, no reasoning employed, nor is there any language save the bare statement that the co-surety from whom contribution was undertaken, was not by his own act, a debtor of the surety who had paid, but became so by reason of such payment.

The case of *Neilson & Churchill v. Fry*, 16 O. S., 553, was a suit between co-sureties, wherein one who had paid the full amount of a judgment upon which another was equally liable, brought suit against the latter for contribution.

1916.]

Logan County.

The form of that action was equitable in that plaintiff was invoking the fiction of subrogation because plaintiff had paid the judgment, but he actually sought no equitable relief.

The court, disregarding the form so attempted to be impressed by the plaintiff on the transaction, held the latter to be in *substance* one for the recovery of money only.

The controlling question in the case, was that of applicability of the statute of limitation, and the court decided the action to have been barred by the lapse of six years, inasmuch as the ultimate (and only) relief sought was the recovery of money only.

The question of notice of payment as a condition precedent to the right to maintain the action, was raised and discussed in the case, but was not necessarily material to the decision, because of the bar of the statute of limitation.

In discussing the question of notice, the language of the court is conflicting. At one place (page 556) it is said that, if the action was to be regarded merely as the old action of assumpsit, to recover money *equitably* due, the defense of want of notice, would have been a good bar to the action, whilst at page 558, it is stated that if recovery of the money be sought by simple action, or by the aid of the fiction of substitution, *costs* could not be recovered without previous notice of the payment.

It should also be noticed that paragraph three of the syllabus not only covers the question of the statute of limitation, but the necessity for notice of payment, is restrained to the question of *costs*.

The decision was by a divided court, three judges concurring, and two dissenting, as to the third proposition of the syllabus.

Turning from the inharmonious expressions in the above mentioned cases, to the decisions of the courts of final resort in other states, no dissention can be found. All agree upon the proposition that neither notice, nor demand of, payment need be given a co-surety, before commencement of an action against him, for contribution. The following are among the leading cases: 19 Pickering, 260; 53 California, 686; 9 Iowa, 479; 5 Atlantic Reporter, 801; 25 American Decisions, 714; 26 American Decisions, 265; 5 Vermont, 60; 34 Northwestern Reporter, 921.

To the like effect are these authoritative text-books: Childs on Suretyship and Guaranty, 329; Stearns, the Law of Suretyship, 523; Spencer on Suretyship, Sections 149, 154; Pingrey on Suretyship and Guaranty, Section 196; Brandt, Suretyship and Guaranty, Section 319.

In harmony therewith, is also the modern and most excellent and dependable work, Ruling Case Law, Volume 6, page 1045.

The judgment will therefore be reversed, and the cause remanded for a new trial.

With respect to the taxing of costs, it is sufficient to say that where the action in which contribution is sought does not involve equitable relief, the matter is now governed by Section 11624, General Code, which requires them, in a case like the one at bar, to be adjudged against defendant.

KINDER, J., and ANSBERRY, J., concur.

**MAINTENANCE OF ELECTRIC LIGHT POLES BY PRIVATE
COMPANY IN FRONT OF RESIDENCE PROPERTY.**

Court of Appeals for Lucas County.

ELLEN HUSS V. TOLEDO RAILWAYS & LIGHT CO.

Decided, June 7, 1915.

Municipal Corporations—Erection and Maintenance of Electric Light Poles by Private Company—Can Not be Enjoined by Abutting Owner—Location of Poles Within the Discretion of the Municipal Authorities.

1. A private company may erect and maintain in the streets of a municipality electric light poles and wires for lighting the public streets under a contract with the city; such construction does not invade the rights of an abutting owner, and such owner can not maintain injunction proceedings, even though a portion of the current carried is for private purposes, provided such additional use does not impair the abutter's property in any essential degree.
2. The location of poles and wires for lighting the public streets rests with the city authorities, and will not be interfered with by the courts in the absence of fraud or an abuse of discretion.

1916.]

Lucas County.

Charles A. Thatcher, for plaintiff.*Tracy, Chapman & Welles*, contra.

RICHARDS, J.

This action was commenced by filing a petition in the court of common pleas on April 30, 1915, seeking to enjoin the defendant from erecting poles and stringing wires thereon in front of the property of the plaintiff on Williams street in the city of Toledo. To this petition the defendant filed an answer in which it avers that it has a contract with the city of Toledo, by the terms of which it is to furnish street lights for the streets, boulevards and parks in the city of Toledo, and is proceeding to erect a line on Williams street for that purpose, having received a permit therefor from the proper officials of the city. The defendant further avers that no wires are to be placed on the line of poles except such as carry current for the above purposes.

The evidence discloses that the plan of construction involves the placing of only one pole in front of the premises of the plaintiff, and the precise location of that pole has been heretofore fixed by order of this court. It appears further from the evidence that the plan involves the placing of eleven high tension wires to be used almost, if not entirely, for street lighting purposes. The poles are also to carry four wires composing a 3-phase, 60 cycle, A. C. Circuit, carrying 4600 volts. No serious question can be made as to the right of the defendant to construct the line in the place located, for the purpose of street lighting, including the eleven wires carrying current for arc lights; but it is strenuously insisted that the defendant has no right to erect or maintain the four other wires which are used not only for street lighting, but for other private purposes. The evidence discloses that these four wires compose one circuit and that such method is proper for good construction. It appears that the current from these four wires is used for lighting the streets, the drives, walks and buildings in Walbridge Park; the union depot and the grounds and streets adjoining the same; and also for general lighting of the fire departments on Broadway, and lighting and power at the water-

works station on Broadway, and general distribution of incandescent lighting in the vicinity of Broadway and extending to Glendale avenue. None of the wires named will carry current to be used solely for private incandescent lighting, nor solely to carry energy for private power plants. On the contrary, the four wires named serve a dual purpose, one of the chief purposes being the lighting of the public streets in that portion of the city. It does not appear from the evidence that the use of a portion of this current for private purposes has necessitated, or will necessitate, any larger poles or wires, or a greater number of wires or cross-arms.

We assume that the defendant has the right in this state, without any doubt, to erect and maintain a line of poles and wires for the purpose of lighting the public streets of the municipality, and the question here for determination is whether that right is in any wise curtailed by the fact that the same line of poles and wires carries current which is used in part for private purposes. The leading case in Ohio on this matter is *Callen v. Light Co.*, 66 Ohio St., 166. In that case it was announced by the court that it was a diversion of the street from the purposes to which it was dedicated, for a private lighting company to erect poles and string wires thereon of electric light cable lines for furnishing light and energy to private takers. It was further held in that case that this diversion of the street from the purposes for which it was dedicated was not relieved against by the fact that a fire alarm box used by the city was placed on the pole erected adjacent to plaintiff's property. It is true that the question to be determined in the case of *Callen v. Electric Light Co.*, *supra*, was not precisely the same as that which we have for determination, because in that case the company had no contract for lighting any of the streets of the city in the neighborhood where the plaintiff's property was located, nor was it in fact furnishing or proposing to furnish any such service at that place, and hence it could not claim the right to erect or maintain the line of poles and wires at that place for street lighting purposes. In the consideration of that case the Supreme Court, speaking through Spear, J., discusses in detail

1916.]

Lucas County.

the question now under consideration in the instant case. It is said in the course of that opinion that the case is to be determined by a consideration of the question whether or not the acts of the defendant complained of constitute in an essential degree a taking of property within the meaning of the Constitution, and it is further stated by the court, in substance, that the defendant did not have the right to place permanent erections in the street in front of the plaintiff's property if by so doing, it in any appreciable degree impaired the owner's access to the lot, or otherwise interfered with the full enjoyment of the lot for all purposes to which it was adapted, or of the street itself. It must be borne in mind, in considering the discussion of that case and the conclusion reached by the court, that it had under consideration a case in which the electric lighting provided by the defendant was not of the streets, but that it was wholly for private use and, therefore, was not in any sense a street purpose, but was solely a private one. The fundamental principle was stated by the court that the city's control of the streets is confined to street purposes and is not for general municipal purposes. Nevertheless, the court used this language on page 180:

"Whatever is a necessary incident to that use, the city may provide. Sewers, for instance, drain the surface water and thus relieve the streets from impairment and destruction, and in this respect sewers are for a street purpose; while, in addition, they may drain abutting property, thus tending to promote the public health, and in this respect they serve a municipal purpose. The same may be said as to water supply for cleansing and sprinkling the streets, and by owners of property abutting for cleaning and domestic uses, and for the extinguishment of fires. Light, also, is necessary for street purposes, and is convenient for the use of citizens, thus serving two uses, one a street purpose and the other a municipal purpose."

The fact that fire alarm apparatus was a strictly municipal convenience was held not to justify the construction, for it was apparent that this apparatus might properly be constructed on a short post in an unobjectionable location. The language above

quoted is a clear declaration by the Supreme Court that poles and wires constructed for purposes of furnishing light for the public streets may serve as well a dual purpose, and if such dual purpose did not result in impairing the plaintiff's property in any essential degree, or to any appreciable extent, then injunction would not lie.

The doctrine is well announced in *1 Joyce, Elec. Law* (2d Ed.), Sections 233, 276 and 333. The author of that work in an illuminating discussion of the question, reaches the conclusion that if a line of poles and wires is erected for the purpose of lighting the public streets, it is not an additional burden that the same line also carries current used for private purposes.

We conclude from the evidence in this case that no appreciable or essential additional burden is cast upon the plaintiff's property by the fact that a portion of the current which is carried on some of these wires is used for various private purposes.

It is insisted by the plaintiff that the line of poles and wires should have been constructed on another street or on the opposite side of Williams street. No abuse of discretion is shown on the part of the city authorities in locating the line at the place where it has been located, with the pole in front of plaintiff's property placed where directed by this court, and we apprehend the true rule to be that in the absence of fraud or an abuse of discretion, a court will not interfere with the action of the municipal authorities on that matter. Of course, the right of the defendant to maintain this line could only extend for the time during which it supplies light for lighting the public streets of the city.

The injunction will be so modified as to allow the erection and maintenance of the pole on plaintiff's property at the place indicated, only, and in other respects will be dissolved.

CHITTENDEN, J., and KINKADE, J., concur.

1916.]

Hamilton County.

VALUE OF A BOY'S LEG.

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION COMPANY AND THE ADAMS EXPRESS
COMPANY V. JOHN WYNNE, GUARDIAN OF JAMES
RUSSELL WYNNE, AN INFANT.*

Decided, July 6, 1915.

*Negligence—Joint Tort Feasors—Determination as to the Liability of
Both or Either—Joint Enterprise—Fellow-Servant—Charge of
Court—Damages for Loss of a Leg by a Boy.*

1. The negligence of the driver of an express company's wagon can not be imputed to the wagon boy, who was to some extent under the direction of the driver, and whose business it was to keep watch that no packages were lost or stolen; nor can it be said that the driver and boy were engaged in a joint enterprise; and as to whether or not they were fellow-servants was a question properly left to the jury under the evidence adduced.
2. Where two parties have been made defendants as joint tort feasors, the question may properly be submitted to the jury whether the injury complained of was due to the concurrent negligence of both, or whether it was caused by the negligence of either.
3. The court regards a judgment of \$10,000 in favor of a fourteen year old boy for the loss of a leg as excessive, and the plaintiff below is given the choice of acceptance of \$7,500, or a reversal.

Robertson & Buchwalter, for Adams Express Co.

George H. Warrington and Robert S. Marx, for Cincinnati Traction Co.

Littleford, James, Ballard & Frost, contra.

GORMAN, J.

On November 7, 1911, about 6:30 P. M., a street car of the Cincinnati Traction Company and a wagon of the Adams Express Company collided at the corner of Ninth street and Freeman avenue in the city of Cincinnati. As a result of this colli-

*Affirming *Wynne, Guardian, v. Cincinnati Traction Co.*, 18 N.P.(N. S.), 409, with the exception of the amount of damages to be allowed.

sion James Russell Wynne, a fourteen year old wagon boy employed by the Adams Express Company, was thrown from the wagon and sustained injuries which required the amputation of his left leg about three inches below the knee. John Wynne, his guardian, commenced this action against both defendant companies as joint tort feasons.

The plaintiff in his petition alleged that the boy was injured as the result of the concurrent negligence of the two defendant companies and that the negligence of both was the proximate cause of the boy's injuries. It was claimed that the negligence of the traction company's employee consisted in running the car at a high and excessive rate of speed without giving any warning of its approach and without the motorman being on the lookout and without having his car under proper control. Plaintiff alleged that the negligence of the Adams Express Company was that the driver of the wagon upon which the boy was riding, was in driving at a high and reckless rate of speed and that the driver failed to keep a lookout when approaching the crossing at Ninth and Freeman streets. The boy was standing upon the rear part of the wagon, which was heavily loaded, where it was his duty to stand as assistant to the driver of the wagon. When the collision occurred the wagon was struck near the left hind wheel and the boy was thrown under the wheels of the street car and his left leg was badly mangled, so that an immediate operation and amputation were necessary.

Upon the trial of the case the jury returned a verdict in favor of the plaintiff as guardian of James Russell Wynne in the sum of \$15,000. The trial court on the application for new trial found the verdict excessive in the sum of \$5,000, and decided that a new trial would be granted unless the plaintiff would consent to a remittitur. Plaintiff accepted this reduction and judgment was entered in his favor for \$10,000. The cause is now in this court on error to reverse the judgment of the court of common pleas.

The Cincinnati Traction Company, plaintiff in error, claims that the negligence of the express company's driver was the sole proximate cause of the boy's injury, while the Adams Express

1916.]

Hamilton County.

Company claims that the sole proximate cause of the boy's injury was the negligence of the motorman of the traction company.

This is one more instance of the thousands which have occurred since the comedy enacted by Adam and Eve in the Garden of Eden, where each sought to excuse misconduct by shifting the blame on to the other or the serpent.

We are satisfied that each of the plaintiffs in error has demonstrated that the other was guilty of negligence proximately contributing to the injury of the boy. We think the evidence in this case was sufficient to warrant the jury in finding that the negligence of both the traction company's motorman and the express company's driver contributed directly and proximately to the injuries of this boy. The negligence of the driver of the wagon could not be imputed to the boy. He had no part in the driving of the wagon nor any control over the driver; his place was on the rear end of the wagon, and he was standing there when he was injured.

It was proper to submit the question to the jury, as the court did, whether or not the boy's injury was the result of the concurrent negligence of the two defendants below or whether it was the result of the negligence of either.

It is claimed by the traction company that the driver of the wagon and the wagon-boy who was hurt were engaged in a joint enterprise, and therefore the boy can not recover if his injury was caused or partly caused by the negligence of the driver of the wagon.

We are unable to say on the evidence in this case that the boy and the driver of the wagon were engaged in a common enterprise because they happened to be employed by the same employer and were both upon the wagon at the time the boy was injured. There was evidence tending to show that the driver of this wagon had authority and direction over the boy and that he was the assistant to the driver, and that the driver gave orders to the boy as to what he was to do. We think the jury were warranted in finding that the driver was a superior of the boy and stood in the place of his employer, the Adams Express

Company, in his relation towards the boy. The boy had nothing to do with the driving of the team; he was not even sitting upon the front seat with the driver. No part of his duties required him to either drive the team or to keep a lookout for the driver. He had no interest whatsoever in the driving of the team, and we can see no application in this case of the rule laid down in *Kistler v. R. R. Co.*, 66 O. S., 326. If the boy and the driver had owned the wagon and were using it in the prosecution of their joint business, then there might be some foundation for the claim that they were engaged in a joint enterprise. *Railway Co. v. Fippin*, 13 C. C. (N.S.), 125.

It is claimed by both the plaintiffs in error that the amount of the damages is excessive even after the remittitur made by the trial court, and this court is of the opinion that a \$10,000 verdict would be excessive under the circumstances. The boy's left leg below his knee has been lost, and there is no doubt but that he suffered great pain and anguish, but so far as his ability to earn a livelihood is concerned we think that will not be impaired to the extent claimed by his counsel. Upon a full consideration of this question we are of the opinion that \$7,500 would be ample compensation in this case, and that there should be a remittitur of \$2,500 from the amount of the judgment entered by the court below. This court is authorized, in the exercise of a sound discretion, to make the acceptance of this remittitur of the excess a condition of refusing to grant a new trial, upon the authority of *Pendleton St. Ry. Co. v. Rahmann*, 22 O. S., 446.

It is claimed by counsel for the Cincinnati Traction Company that the court erred in charging the doctrine of "last chance" in this case. As we read the charge given by the court at the request of counsel for the Adams Express Company it does not involve the "last chance" doctrine. In order to make a "last chance" case it would have been necessary for the boy only to have been guilty of contributory negligence, and although this plea was set up by the traction company we are not able to find any evidence in the record to support the claim of contributory negligence. It is quite certain that the boy was not placed in

1916.]

Hamilton County.

a perilous position by reason of his own negligence, but it was by reason of the negligence of the driver of the wagon.

We think that special charges Nos. 4 and 6 complained of were warranted under the rule laid down in *Street R. R. Co. v. Brandon*, 87 O. S., 187. This was a collision at a street crossing, and there was no "last chance" question raised in the case. Nevertheless, Judge Spear in deciding the case uses the following pertinent language, on page 196:

"But assuming that Brandon was guilty of some negligence in driving on the track, yet if the motorman in the exercise of even ordinary care, after he saw the horses and appreciated Brandon's peril, had time and opportunity to avoid the possible consequences by checking the car, and neglected to so exercise such care, such neglect would be negligence and might properly be regarded as the proximate cause of the injury."

As we have said, the negligence of the driver can not be imputed to the boy, and therefore if we assume that the driver was guilty of negligence which contributed proximately to the injury of the boy, nevertheless that situation does not present a "last chance" case.

We find no errors in the general charge, nor do we find that the boy was guilty of any contributory negligence.

We are of the opinion that the traction company and the express company were joint tort feors in this case, and that the case of *Kopp v. B. & O. R. R. Co.*, 6 C.C.(N.S.), 103, affirmed by the Supreme Court, 70 O. S., 436, and the case of *Street Ry. Co. v. Murray*, 53 O. S., 570, as well as other cases of a similar kind, support this claim of the defendant in error that the plaintiffs in error were joint tort feors.

The Adams Express Company claimed that the wagon-boy and the driver were fellow-servants. The court submitted that question to the jury under the evidence, and the jury found that they were not fellow-servants. We think there was evidence sufficient to warrant the jury in reaching this conclusion.

Counsel for the traction company complain of error on the part of the court in allowing the cause to proceed after one of the jurors became ill and complained of not feeling well, al-

though he continued and sat in the case with the other jurors until the case was finally disposed of. He complained of pains in his leg, and counsel for the traction company urges that his mind was so occupied with his own misery and pains that he was unable to give the traction company or the express company a fair trial. The juror did not ask to be excused, and the court did not excuse him. He continued to serve, and, for all that appears in the record, his affliction did not affect the verdict. We see no good reason why a reversal of this case should be predicated on a claim of this kind.

Upon an examination of the entire record we are of the opinion that the defendant in error should submit to a reduction of the judgment in the sum of \$2,500, and if it does so, the judgment will be affirmed; otherwise it will be reversed, because in the opinion of the court the verdict and the judgment are excessive.

JONES (Oliver B.), J., concurs.

JONES (E. H.), P. J., dissenting:

I can not concur in the opinion that the judgment is excessive, and favor its unconditional affirmance.

1916.]

Hardin County.

ILLEGAL PROCEDURE AGAINST A CIVIL SERVICE COMMISSIONER.

Court of Appeals for Hardin County.

JAMES E. LEWIS v. GEORGE H. LINGREL, MAYOR OF THE CITY OF KENTON.

Decided, February 24, 1916.

Writ of Prohibition—May be Invoked by the Injured Party—Procedure for Removal of a Civil Service Commissioner—Mayor Exceeds His Jurisdiction—Charges Generally Stated in the Words of the Statute Insufficient—Investigation by the State Civil Service Commission Not a Prerequisite.

1. A writ of prohibition may issue, in a proper case, upon the application of a person in his own behalf to prohibit an inferior tribunal from exercising jurisdiction, not possessed by such tribunal, to the injury of such person.
2. The chief executive of a city has no jurisdiction under Section 486-19, General Code, to try a municipal civil service commissioner on a charge of inefficiency, neglect of duty or malfeasance in office, which charge contains no averments of the facts which constitute such inefficiency, neglect of duty or malfeasance in office. And in such a case prohibition is a proper remedy.
3. An investigation of the official conduct of a city civil service commissioner by the state civil service commission or the making of a report of such investigation in writing to the chief executive authority of such city, is not a condition precedent to filing or prosecution of charges of official misconduct against such city civil service commissioner before such chief executive.

Johnson & Johnson and Price & Price, for plaintiff.

C. M. Cessna, City Solicitor, contra.

ROBINSON, J.

On the 22d day of January, 1916, the plaintiff filed his petition in this court, alleging that the defendant, George H. Lingrel, is the duly elected, qualified and acting mayor of the city of Kenton, Ohio; that the plaintiff is an elector of said city; that on the 13th day of March, 1915, by the consideration of Charles

R. Price, then mayor of said city of Kenton, he was appointed a member of the municipal civil service commission of said city for the unexpired term of four years ending January 1, 1918; that on said 13th day of March, he qualified and ever since has been acting as such civil service commissioner; that on the 18th day of January, 1916, the defendant herein, through the registered mail of the United States, notified him that he had been charged with "inefficiency in office, neglect of duty in office, and malfeasance in office" as a member of said civil service commission of the city of Kenton, Ohio, and that he had been removed from said position and office, said removal to take effect January 26, 1916, unless a hearing was demanded on said charges and on such hearing such charges were not sustained; that on the 20th day of January, 1916, the plaintiff demanded of the defendant a copy of said charges, an opportunity to be publicly heard in person and by counsel in his own defense; that the said George H. Lingrel, mayor as aforesaid, refused to furnish plaintiff with a copy of such charges, and notified the plaintiff that the hearing on said charges would be set for Saturday, January 22, 1916, at 9 o'clock; that on the 22d day of January, 1916, at the mayor's office in Kenton, Ohio, the plaintiff appeared in person and by counsel and objected to said George H. Lingrel, mayor as aforesaid, proceeding with the hearing on said charges or in any way exercising jurisdiction in said matter; that said objections were made in the form of a motion, which motion was overruled by said mayor; that no investigation as to whether the said plaintiff, as a member of said civil service commission, was violating or failing to perform the duties imposed by law, or was wilfully or through any culpable negligence violating the provisions of law or failing to perform his duties as a member of such commission, was ever made by the state civil service commission and no report of any violation or failure to perform his duties as such commissioner was ever made by said state civil service commission to the mayor of the city of Kenton, Ohio, or made a public record by said mayor; that the plaintiff can not defend against said charges unless he be furnished with specifications, stating with substantial certainty the particular act or acts or the omis-

1916.]

Hardin County.

sions thereof which constitute his inefficiency, the particular duty or the omission thereof which constitute his neglect of duty, and the particular acts which constitute his malfeasance in office; that the said George H. Lingrel, mayor, is threatening to and will, unless restrained by the order of this court, proceed without authority of law, to hear and determine said charges; and that the plaintiff is without a remedy at law.

Upon the filing of this petition, a temporary writ prohibiting the defendant from further proceeding in said matter was issued out of this court.

This cause then came on for hearing upon the motion of the defendant to dissolve the temporary writ of prohibition for the reasons that the facts stated and the allegations contained in plaintiff's petition, and upon which said writ was issued, are insufficient, if proved, to sustain said writ and that said petition does not state facts sufficient to constitute a cause of action against the defendant.

The court has treated this motion as a general demurrer.

The first question which presents itself to the court is, whether this action is properly brought in this court by the plaintiff in his individual capacity, or whether the same should not have been brought in the name of the state.

The right to a writ of prohibition originally belonged to the sovereign, and was issued by the sovereign to restrain inferior courts from assuming jurisdiction which they did not possess. But through the years the right to the writ has been enlarged until it has become a remedy which either the state or any party or person aggrieved may invoke in a proper case. And while the usual way of invoking the writ has been by the state on relation of the complaining party, there is now, in this country at least, abundant authority for the injured party to invoke the writ in his own behalf. *Trainer v. Porter*, 45 Mo., 336; 32 Cyc., 625.

The next proposition which presents itself for the determination of the court is, whether the defendant in this case was so far exceeding his jurisdiction in proceeding to hear and determine the alleged charges against the plaintiff as require this court to interfere by this extraordinary remedy.

The chief executive of a city has only such jurisdiction to try and remove a civil service commissioner as the statute gives him, and his office is essentially ministerial rather than judicial.

Section 486-19 of the General Code provides—

“That the chief executive authority of such city may at any time remove any municipal civil service commissioner for inefficiency, neglect of duty, or malfeasance in office, having first given to such commissioner a copy of the charges against him and an opportunity to be publicly heard in person or by counsel in his own defense, and any such act of removal shall be final.”

This provision gives to the chief executive of a city jurisdiction which in its nature is judicial in the matter of removing a city civil service commissioner, and provides that such commissioner, before his removal, shall be furnished with a copy of the charges against him and shall have an opportunity to be heard in person and by counsel.

The charges filed against the plaintiff herein before said chief executive were in the following words:

“Mr. J. E. Lewis. You are hereby charged with the following, as a member of the Civil Service Commission of the city of Kenton, Ohio, to-wit:

“1. Inefficiency in office.

“2. Neglect of duty in said office.

“3. Malfeasance in office.

“Any one of said charges, if true, is a cause for removing you from said office.

“You are therefore notified that you are removed from said position and office as a member of the Civil Service Commission of the city of Kenton, Ohio, to take effect on January 26, 1916, unless a hearing is demanded on said charges before said time and upon said hearing said charges are not sustained.

“If you desire a hearing on said charges you will notify me at once.

“Witness my hand and official seal at Kenton, Ohio, this 18th day of January, A. D. 1916. George H. Lingrel, mayor of the city of Kenton, Ohio. Seal.”

The charges are in the words of the statute only and embody no facts apprising the accused of what facts constitute his ineffi-

1916.]

Hardin County.

ciency, what things he has neglected to do which he should have done, or what things he has done which he should not have done. And said charges are made by the said George H. Lingrel as mayor of said city.

In the case of *State, ex rel Meader et al, v. Sullivan*, 58 Ohio State, 504, the Supreme Court had occasion to pass upon a similar statute pertaining to the members of the board of equalization, and involving a similar power conferred by said statute upon the mayors of cities. And in so doing it declared that the power so conferred upon a mayor "is a special authority, and must be strictly pursued. Such power can not be exercised arbitrarily, but only upon complaint, and after a hearing had in which an officer is afforded opportunity to refute the charge made against him. Nor has the mayor in such case authority to proceed to a hearing until charges have been preferred which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office, and of which the accused has had due notice."

And again, in the case of *State, ex rel Attorney-General, v. Hoaglan et al*, 64 Ohio State, 532, said court holds:

"When a public officer may be removed for specified causes, such facts must be stated as in judgment of law constitute the cause relied on."

The charges filed against this plaintiff do not contain any facts by which the plaintiff might be apprised of the accusations which he would be required to meet, nor any facts which in judgment of law constitute inefficiency in office, neglect of duty in office or malfeasance in office.

We are therefore of the opinion that there were no charges filed against the plaintiff which gave to said George H. Lingrel, mayor, jurisdiction to proceed to the hearing and determination of the question attempted to be raised by the so-called charges filed; and since neither appeal nor error from such judgment of the mayor can be prosecuted, a writ of prohibition is plaintiff's only remedy.

The time elapsing between the 18th day of January, 1916, and the 26th day of January, 1916, the day set for said hearing,

we think was sufficient notice had the charge contained sufficient facts to place the plaintiff upon trial.

We are of opinion that an investigation by the state civil service commission, and the filing of the report of such commission, is not a condition precedent to the filing of charges against a city civil service commissioner. We, however, are of opinion that no public officer, whether his duties be ministerial or judicial, ought to place himself in the position of being both the accuser and the judge of the accused. The accused is entitled to a fair and impartial trial and to a judgment by an unbiased tribunal, and that next to the duty of the officer, acting in a judicial capacity, to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of unfairness or partiality. The propriety of an incumbent of any tribunal making the charges which his duties require him to hear and pass upon is, to say the least, questionable.

The writ of prohibition is therefore made perpetual, prohibiting said George H. Lingrel, as mayor of the city of Kenton, Ohio, from proceeding to try the said James E. Lewis upon the charges as now filed before said mayor.

CROW, J., and KINDER, J., concur.

1916.]

Hamilton County.

ATTACHING THE VENDOR'S STATEMENT TO A CONDITIONAL SALE CONTRACT.

Court of Appeals for Butler County.

CHARLES OGLESBEY V. THE NATIONAL BOX BOARD COMPANY.

Decided, 1913.

Conditional Sales—Method of Placing Vendor's Statement "Thereon"—Section 8568 Construed.

It is a sufficient compliance with Section 8568, General Code, relating to conditional sales of property, if the statement required by said section to be placed "thereon" under oath, made by the vendor or his agent, is written upon a separate piece of paper and attached by means of fasteners to the conditional sale contract. *National Cash Register Co. v. Closs, Assignee*, 12 C.C.(N.S.), 15, overruled.

Stanley Shaffer, B. F. Harwitz and W. C. Shepherd. for plaintiff in error.

JONES (E. H.), J.

The question decided by the court below, from whose judgment this error proceeding is prosecuted, arose upon an intervening petition filed by plaintiff in error, the Hooven, Owens & Rentschler Company, claiming title to an engine which it had previously sold to the National Box Board Company, which company later went into the hands of a receiver. This controversy is between the mortgagees and general creditors and the vendor of the engine, plaintiff in error here, and presents the question whether or not the engine shall be considered as general assets of the concern, and whether or not it will be sold and the proceeds applied generally towards the payment of debts, or whether it remains the property of Hooven, Owens & Rentschler Company under the terms of conditional sale, which was evidenced by a paper writing in the ordinary form as provided by Section 8568, General Code, and duly filed by them in the recorder's office. This conditional sale is attacked by the general

creditors as not binding by reason of the fact that the statement required by Section 8568 to be "thereon" under oath made by the vendor or his agent, is not in compliance with the statute in that it is not written upon the same piece of paper as the copy of the contract, but upon a separate piece of paper and attached by means of brass fasteners to said copy of the conditional sale contract, which itself consisted of several pieces of paper attached together by similar fasteners.

Defendant in error, in support of its contention, relies upon the case of *National Cash Register Company v. Closs, Assignee*, 12 C.C.(N.S.), 15. It appears that case supports the contention here made by the defendant in error, as well as the judgment of the lower court; but on careful consideration of the question here presented we feel that we are not bound by that decision and therefore must decline to follow it. The decision in that case seems to have been based upon the conviction that the word "thereon" had the same force and effect as had the language in regard to the acknowledgment of a deed in Section 8510, General Code, which expressly provides that the certificate must be on the same sheet on which the instrument is written or printed and which was construed in *Winkler v. Higgins*, 9 O. S., 599, to require strict compliance in order to make a valid deed. But the case of *Norman v. Shepherd*, 38 O. S., 320, held good a mortgage which was written on several sheets with a material part the testatum clause, upon the same sheet as the certificate of acknowledgment.

We are of the opinion that the requirements of Section 8568 have been sufficiently complied with in the preparation and filing of the contract of conditional sale, and that it reserved to the Hooven, Owens & Rentschler Company title in said engine against the claims of all creditors of the National Box Board Company, including the prior mortgagees.

Upon the other question involved in this case, viz., as to whether or not this engine became a fixture, we are clearly of the opinion that it did not; that it remained personalty in accordance with the terms of the contract which evidenced the intention of the parties and was notice to all persons.

1916.]

Hamilton County.

It follows that the judgment of the lower court should be reversed and judgment entered for the vendor, plaintiff in error.

SWING, J., and JONES (O. B.), J., concur.

TITLE TO GOODS DELIVERED SUBJECT TO APPROVAL.

Court of Appeals for Hamilton County.

IN RE CHARLOTTE T. BROWN ET AL.

Decided, January 31, 1916.

Title—Remains in the Seller—Where Goods Delivered Subject to Approval—Are Retained for a Time Without Notice of Rejection.

Where goods are placed in the house of a possible purchaser, without being selected by him or the selling price being made known to him, the fact that he permitted the goods to remain in the house without notice of rejection for eight days after a bill for them had been submitted does not render the sale complete and title remains in the seller.

Samuel Wolfstein and Dempsey & Nieberding, for W. H. Davis.

Worthington, Strong & Stettinius, for Loring Andrews.

Thomas Bentham, for trustee.

PER CURIAM.

After a consideration of the facts in this case and applying thereto the law of Ohio with regard to sales we reach the conclusion that on May 9, 1913, the title to the personal property in question was in the Loring Andrews Company and did not pass to the assignee.

Section 8399, General Code, provides:

“Rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer” and by the language of the section said rules do not apply where a different intention appears.

The goods were sent to Mrs. Brown's house on approval, and hence the second subdivision of rule 3 of Section 8399 would apply here. It provides:

“(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

“(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

“(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.”

Mrs. Brown had not signified her approval or acceptance of the goods, but she had retained them without notice of rejection. As no time was fixed for the return of the goods, the sale would be complete on expiration of a reasonable time, and what is a reasonable time is the question of fact in this case.

The time may vary owing to the circumstances of each case. Here no price was given Mrs. Brown on the goods. Most of the articles had not been selected by her, but were placed in her home during her absence. She had no intimation of the price or that the goods were charged to her as sold until eight days before the assignment. At that time and for months before, she was ill, insolvent and much worried over business affairs of a different nature, of greater magnitude and “nearer consequence.” The fact that she let eight days elapse after receipt of this bill when she was obviously contemplating bankruptcy is not conclusive evidence that she accepted the goods. She could have returned the bill received by her with notice of rejection and would not have been indebted to the firm for same.

Such being the case the assignee or trustee has no claim upon the goods and the Loring Andrews Company are entitled to the proceeds of the sale of the property, to-wit, \$1,200.

1916.]

Medina County.

**ASSESSMENT FOR LOSSES SUSTAINED BY A MUTUAL
INSURANCE ASSOCIATION.**

Circuit Court of Medina County.

**THE FARMERS' MUTUAL FIRE & LIGHTING INSURANCE ASSOCIA-
TION OF MEDINA COUNTY v. L. J. CROW.**

Decided, November, 1903.

Mutual Insurance Associations—What May be Included in Assessments.

Where the by-laws of a mutual fire insurance association organized under Sections 3686-3690, Revised Statutes, provide that an assessment shall be levied at a certain date each year to pay the losses incurred and incidental expenses, the inclusion in the amount for which assessments are levied of an amount sufficient to reimburse officers of the company for money which they had advanced to pay losses as they occurred, does not make the assessments illegal.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Error to the court of common pleas.

The parties to the original action were the reverse of the parties as they appear in this proceeding in error. In this opinion the term plaintiff will be used to designate L. J. Crow, and the term defendant to designate the insurance company.

The defendant is a corporation organized under the Revised Statutes of Ohio, Sections 3686 to 3690 inclusive, the purpose of the organization being the mutual insurance of the property of its members against loss by fire and lightning.

On the 17th day of April, 1897, the plaintiff procured from the defendant a policy of insurance in the amount of \$1,725, upon a dwelling-house owned by him, together with its contents, and other buildings upon his home premises. This policy by its terms was effective from the 23d day of May, 1897, at noon, to the 23d day of May, 1902, at noon.

On the 20th day of March, 1901, said dwelling-house and most, if not all, of the other property covered by said policy of insurance was destroyed by fire. Proper notice of such fire and

proofs of loss were made to the defendant, but the defendant refused to pay for such loss under said policy because it claimed that the plaintiff had forfeited his right to the protection afforded by said policy.

At the time said policy was issued the plaintiff paid to the defendant a small sum of money.

By the terms and conditions of the policy it was provided that assessments should be made from time to time upon policy-holders, who, by virtue of taking such policies, became members of the association for the payment of the expenses of maintaining the association, and to pay losses which should be sustained by members. This provision as to assessment is found in the constitution of the association which is made a part of the policy, and is in these words:

“Those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses and damages which may occur to any member of said association by fire or lightning.”

The by-laws of the association also made a part of the policy, make provision as to these assessments in these words:

“Each member shall pay his or her assessment within 30 days after date of notice from the secretary, and in default thereof, ten cents per mile shall be added to the amount of his or her assessment, which the secretary shall receive for collecting the same. Should any member fail to pay his or her assessment for more than 60 days, he or she shall forfeit the protection of this association until all dues are paid in, and the secretary shall proceed to collect the same by law in the name of the association.”

Another provision of the by-laws incorporated in the policy is that, upon proper proofs and ascertainment of loss by a member of the association, “the board of directors shall have authority to provide the necessary means for the payment of such loss by borrowing money, or otherwise, within the time specified in the by-laws whenever the same is ascertained and adjusted.”

On the part of the defendant it is urged that on or about the 2d day of July, 1900, the defendant duly assessed against the

1916.]

Medina County.

plaintiff the sum of \$5 to be paid by him on or before the 25th day of September, 1900; that said sum was the proper proportionate share which should have been paid by said defendant for the losses and incidental expenses of the association at the time such assessment was made; that the plaintiff was duly notified of such assessment, but wholly failed and neglected to pay the same within the time limited, or within sixty days after he was duly notified of such assessment, and that he never was reinstated as a member of the association.

Upon the trial it developed that an agreement was made, or undertaken to be made, by the association against the plaintiff at the date and for the amount claimed by the defendant, and evidence was given tending to show that the plaintiff was duly notified of such assessment. It is not claimed that he ever paid it. The plaintiff says, however, that such assessment was not duly and legally made.

It is provided in the by-laws of the association that unless otherwise deemed necessary by the officers of the association the board of directors shall, on the last Thursday in August of each year, meet for the purpose of ordering an assessment to meet the losses and expenses of the association for the past year.

It will be observed that the assessment for the payment of which the plaintiff is claimed to be in default was made on the 2d day of July, and not on the last Thursday in August, but since by the provision of the by-laws such assessment may be made at other times than said last Thursday in August, when deemed necessary by the board of directors, the date of the assessment is not important.

A serious question in the case is whether the assessment was made for the purposes provided by the laws governing the association.

On the part of the plaintiff it was urged that other things were included in the assessment than those for which assessments were authorized to be made—that is, for something in addition to the amount necessary for the payment of the incidental expenses and losses sustained by members.

It appears that, in some instances at least, when losses were sustained, money for the payment of such losses was furnished

by individual members of the board of directors, and that included in the assessment made on the 2d day of July, 1900, was an amount for the repayment of the money so furnished, together with interest thereon, without there having been a formal borrowing of said money by said association; that is, without any meeting of the board of directors at which said borrowing was in terms authorized; and on the part of the plaintiff it is urged that if any part of the amount included in the assessment for non-payment of which the forfeiture on the part of the plaintiff is claimed, was to repay this money so advanced, the assessment was unlawful, and the failure to pay by the plaintiff did not forfeit his rights under the policy.

The court charged the jury, among other things:

“If you find from the evidence that any part or portion or fraction of said \$5 thus assessed against said plaintiff by defendant was assessed to be used by defendant to pay off any person or persons who had advanced any money to pay said losses or expense of said company mentioned and not wholly for the purpose to pay to said persons who had suffered said losses the amount due and owing to them and the expenses of said association after plaintiff became a member, or for money borrowed to pay said losses and expenses by defendant, through its board acting as a board, then said failure of plaintiff to pay said assessment would not defeat his right to recover in this action.”

And again:

“If any portion of said \$5, however small, was assessed against the plaintiff to pay persons for money gratuitously advanced by them without any authorization by defendant through its board of directors acting as such, then your verdict should be for the plaintiff.

Other portions of the charge are to the same effect, the instructions being clearly that the assessment could only be made to pay the incidental expenses of the association, for losses sustained by members of the association and for money borrowed by the association to pay such losses when such borrowing had been done under authorization especially granted by the board of directors at a meeting of such board.

1916.]

Medina County.

Various requests were made by the defendant for instructions to be given to the jury, all of which, except the one marked "Request No. 4," were given. The jury retired after these instructions were given, and later returned into court, reporting that they were unable to agree upon a verdict, whereupon the court ordered the said jury to retire to its jury-room and return a verdict for the plaintiff, as prayed for in his petition. The jury thereupon retired to its room, and upon coming again into court, returned a verdict for the plaintiff.

Motion for a new trial was made by the defendant, which was overruled, and judgment was entered upon the verdict.

Numerous errors are claimed on the part of the defendant, one of which is that the court erred in refusing to grant "Request No. 4," which was, in part, that if a part of the assessment made on the 2d day of July, 1900, was one which might lawfully be made and the balance one which might not lawfully be made, that the plaintiff forfeited his membership by not paying so much of said assessment as was lawfully made. There was no error in refusing this request. The duty was upon the insurance company to fix the right amount to be assessed and to notify the plaintiff of the amount which was legally due from him and if the amount so claimed from him was not the lawful amount it did not devolve upon him to ascertain and tender to the association the amount which it might lawfully have claimed.

There was, however, error in the charge of the court that no assessment could lawfully be made which should include an amount for the repayment of moneys furnished for the payment of losses. If money was furnished by the officers of this association which was properly used by such association in the payment of losses sustained by its members, and such use of the money was ratified by the association by levying an assessment to repay, it was proper to treat such money as a loan to the association. No possible harm could come to the association or any of its members by using money obtained by this means rather than by using money after a formal loan had been made. It would be a most inequitable and unjust rule to hold that the members of this association might have the benefits of having its losses paid by one of its officers, or some other person, and

then say that the members of the association could not be assessed to pay the money so furnished.

It follows from what has been said that the court erred in instructing the jury to return a verdict for the plaintiff, and for these errors the judgment is reversed and the case remanded to the court of common pleas for further proceedings.

COLLECTION FOR GOODS IN EXCESS OF THOSE SHIPPED.

Circuit Court of Cuyahoga County.

**BENJAMIN EMMERMAN ET AL V. THE OHIO IRON & METAL
COMPANY.**

Decided, December 8, 1902.

Attachment—When Debt Fraudulently Contracted.

An action to recover money paid to the defendant by reason of the defendant having billed and collected for goods in excess of the amount of goods actually shipped to plaintiff, is an action to collect a debt fraudulently or criminally contracted within the meaning of Section 5521, Revised Statutes, and is ground for attachment.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Error to the court of common pleas.

The Ohio Iron & Metal Company, which is a corporation, brought suit in the court of common pleas against Benjamin Emmerman and others, his partners in business, which suit is still pending in that court. As the time of filing the petition an affidavit was filed by the plaintiff for an attachment against the defendant. Later an alias affidavit for attachment was filed and an attachment was allowed. The defendant below moved for a dissolution of such attachment. This motion was overruled, and it is to reverse the judgment overruling such motion that this proceeding is prosecuted. The evidence introduced in the court of common pleas upon this motion was not brought before us by bill of exceptions and can not, therefore, be considered, but one of the grounds of the motion is that the affidavit upon

1916.]

Cuyahoga County.

which the attachment was allowed is insufficient. That affidavit, omitting the formal parts, reads:

“That the claim on which this suit is brought is damages sustained by plaintiff by reason of the fraudulent sale by defendant to plaintiff of a quantity of steel scrap, in billing and collecting from plaintiff for 93,600 pounds and fraudulently shipping only 36,060 pounds of said scrap.”

The affidavit in all particulars except as above quoted, is conceded to be sufficient and the question is, is there such a statement in so much of the affidavit as is quoted to bring it within the statute.

The proceeding for attachment is based upon Section 5521, Revised Code, and the language of the section is:

“That in a civil action for the recovery of money the plaintiff may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds herein stated. 1. When the defendant or one of several defendants
* * *

“9. Has fraudulently or criminally contracted the debt, or incurred the obligation for which suit is about to be or has been brought.” * * *

The whole question is, whether the language above quoted from the affidavit in this case shows that the debt for which the suit was brought was fraudulently contracted. We hold that it clearly does so show. The statement is that the defendants below, by fraud in the sale of certain goods obtained from the plaintiff below pay for more than 50,000 pounds of such goods which they never furnished. If the allegations of this affidavit are true, clearly the debt for which the suit is brought, to-wit: the recovery of the money paid for goods never furnished, was fraudently contracted by the defendant below.

It follows that the judgment of the court of common pleas in overruling the motion to discharge the attachment is affirmed.

CHATTEL MORTGAGES WITHHELD FROM RECORD.

Circuit Court of Cuyahoga County.

**THE GIBSON & PRICE COMPANY v. THE ROUSE & HILLS
COMPANY ET AL.**

Decided, January 26, 1903.

*Fraud—When Withholding Chattel Mortgages from Record Not a Fraud
Upon Creditors.*

Where chattel mortgages, covering all the property and all the accounts and bills receivable of the mortgagor, are taken as temporary security and are withheld from record, not as the result of any agreement nor with fraudulent intent, nor for the purpose of securing credit for the mortgagor from other parties, but to prevent creditors already existing from all pressing demands for payment at once, such mortgage is not a fraud upon present prospective creditors.

White, Johnson, McCaslin & Cannon, for plaintiff.

Blandin, Rice & Ginn and *Cline, Carr, Tolles & Goff*, contra.

CALDWELL, J.; HALE, J., and MARVIN, J., concur.

This case is in this court on appeal from the Common Pleas Court of Cuyahoga County. The facts in the case need not be stated in full, except so far as may be required in the consideration of the questions of law involved in the case.

The defendant, the Rouse & Hills Company, was in business in the city of Cleveland, and B. L. Rouse was the president of the company and representing the company in most of the transactions involved in this action.

B. L. Rouse, while the active man in the Rouse & Hills Company during the course of the events narrated in the evidence in this case, also had a business of his own, which he conducted as B. L. Rouse & Company. His business was largely the manufacturing of goods in the same line as the goods that the Rouse & Hills Company handled and his goods were sold directly to the Rouse & Hills Company. The Rouse & Hills Company were debtors to the bank and were also debtors to H. C. Rouse. B. L. Rouse,

1916.]

Cuyahoga County.

in his individual business, owed \$3,000 in debts. The Rouse & Hills Company was also indebted to B. L. Rouse in quite a considerable sum of money, but, as he was connected with both companies, this indebtedness to him seems to have been treated in this case, upon his authority, as *not* a liability of the company.

The B. L. Rouse Company, through its president, B. L. Rouse, applied to the bank for a further credit, and the bank, upon making an inquiry as to the financial condition of the company, was told by B. L. Rouse that it was indebted to H. C. Rouse upon two notes: one for \$5,000 and the other for \$12,000, and that it had given to him demand *cognovit* notes for the same. Thereupon the bank refused any further credit to the corporation unless the H. C. Rouse *cognovit* notes should be gotten out of the way, and the bank referred the matter to its attorney, Mr. Goff, to determine what could be done in that line. Mr. Goff found that H. C. Rouse was out of the city, in Europe or Africa, and that the firm of Hoyt, Dustin & Kelley were his lawyers, and Mr. Goff thereupon applied to Mr. Dustin in regard to the matter and, after considerable discussion, it was agreed between them that the *cognovit* notes of H. C. Rouse should be merged, but not surrendered, and that he should have a collateral note for the amount of the same, and that the bank, for the amount that the company then owed it and for an additional credit of some \$15,000, was to have a note, and these notes were to be secured by chattel mortgages; one to H. C. Rouse for the amount due him, and the other to the bank for the amount that the company then owed it and the additional credit to be given it.

This was not done without several conferences with B. L. Rouse, the president of the company, and Mr. Smith, who was secretary of the company, and these creditors required statements of the financial condition of the Rouse & Hills Company to be made to them and the officers of the company were examined and questioned carefully as to all the assets shown by the statements and to its mode of doing business and as to whether it was making or losing money in carrying on its business. After a full and exhaustive examination along these lines, Mr. Hoyt and Mr. Dustin became satisfied that the company was solvent and was in a fair way of making money, and that Mr.

B. L. Rouse assured them that when H. C. Rouse returned he would furnish all the money necessary to the Rouse & Hills Company to enable it to pay off the bank, and relieve it entirely from any debts that might be pressing; but the Rouse & Hills Company was just at that time in need of some \$15,000 to take up liabilities that it then owed and which it desired very much to take care of at that time, and Mr. Dustin, being satisfied of the financial soundness of the company and believing what Mr. B. L. Rouse said as to the aid that H. C. Rouse would give it upon his return, he (Dustin) took the responsibility of not entering up judgments on these notes and taking a new collateral note to the *cognovit* notes held by H. C. Rouse, and which were in his possession, and took the chattel mortgage until such time as H. C. Rouse should return to the city of Cleveland.

The securities then taken by way of chattel mortgages and assignments, covered the bills receivable, the accounts and the goods of the Rouse & Hills Company, and also covered all acquisitions that might thereafter come into these lines of credit.

Thus far, it is insisted, that the evidence shows that when these chattel mortgages were given covering substantially all the property of the Rouse & Hills Company within its possession or that might thereafter come into its possession in the carrying on of its business, the Rouse & Hills Company was insolvent, and that the bank, as represented by the officers of the bank and its attorney and the attorney of H. C. Rouse, knew that the company was insolvent and unable to pay its debts. The evidence shows that the Rouse & Hills Company was at that time carrying on its business in the usual way and was meeting its financial responsibility with ordinary promptness, and that it was insolvent was *not* made out to the plaintiff in this case except as the expert bookkeeper sees fit, as a matter of book-keeping, to throw out certain assets and liabilities to the company and reduce the assets of the company by diminishing values. We conclude that the company was *not* at that time insolvent, and that the attorneys who represented the creditors obtaining the chattel mortgages and assignments had no knowledge of the insolvency of the company nor did they have such evidence before them as would warrant a careful man in be-

1916.]

Cuyahoga County.

lieving that the company was insolvent; and that these chattel mortgages were not taken with any intent to hinder, delay or defraud creditors.

These chattel mortgages were supposed to be temporary securities. Relying upon the confidence of B. L. Rouse that H. C. Rouse would aid the company upon his return to the city, it was supposed by all parties that he would do so upon his return and that then matters would be straightened up and everything put into a more permanent form. These chattel mortgages were not filed of record as required by the state of Ohio, Section 4150 of the Revised Statutes, but were held, one by A. C. Dustin, and the other by Mr. Goff—the two creditors to whom they had been given. While these mortgages were thus withheld from the record, the Rouse & Hills Company went on with its business in the ordinary way, buying goods as theretofore and carrying on its business in the usual manner. The money obtained from the bank was used in paying liabilities of the company, and, for aught that appears in this case, the mortgagees knew nothing of how business was carried on by the company, until some little time after the mortgages were taken, when they required that monthly statements of all the business being done by the company should be made to them; these were made, and trial balances also furnished. There was nothing in any of these statements that would indicate to the creditors that the company was not getting along well with its business. After these mortgages had been held for several months without being left for record, Mr. Hills of the company came to the city, he having been out of the city during these transactions, connected with business in the east, and was in consultation with attorneys in the city, and the attorneys representing the chattel mortgages became aware of his presence and, owing to some difficulty between him and Mr. B. L. Rouse of which they had learned, they became suspicious that he intended to do something that might, in some way, be injurious to their securities and, thereupon, by an understanding between them, they took possession of the property secured by their mortgages. Thereafter the Rouse & Hills Company made an assignment to Mr. Ginn and he is in this case representing the creditors generally, while other credi-

tors are being represented by attorneys who make a claim somewhat different from that of the trustee.

It is claimed by the trustee, that these chattel mortgages are void as to all the creditors, while some of the creditors are here claiming that the chattel mortgages are void only as to those credits given before the time of the giving of the chattel mortgages and the time of taking possession under the same.

These facts raise a number of questions in the case:

1st. Are these mortgages invalid as to creditors because the corporation was insolvent when they were given?

As before stated, we think the company was *not* insolvent when the mortgages were given, and we have also said that they were not given to hinder, delay and defraud creditors; and the bank and H. C. Rouse, notwithstanding their mortgages covered all goods purchased by the company and all accounts due to it after the giving of the mortgages, took assignments of accounts as late as on the 29th of the month and not long prior to the time of taking possession under these mortgages; and it may be contended that these mortgages are, therefore, void because of the proximity of the time when the company went into the hands of the trustee. The last claim is that the mortgages are not valid because withheld from record.

This last question is the only one that remains for consideration in this case; and it is determined, first, by the evidence, and second, by a consideration of the law.

The claim made is, that these mortgages were withheld either by agreement between the mortgagor and the mortgagees, to enable the mortgagor to obtain credit in his business, or, if not by such an agreement or understanding to that effect, yet that, under all the circumstances and facts surrounding the transaction, they had the effect to so mislead persons to give credit to the company in the interim of the withholding, that an estoppel will arise in favor of the creditors who, in this interim, extended credit, and will make the mortgage void as to them.

The most favorable evidence in the case is, that there seems to have been an understanding between the attorneys representing the mortgagees, that neither would do anything under his mortgage without giving the other notice. There was no agreement

1916.]

Cuyahoga County.

between the mortgagor and the mortgagees as to the withholding of the mortgage from record. The testimony of Mr. Goff bears upon this question somewhat. This question was asked him.

“He said to you that with the help of the money which was advanced, and the payments which he could make and the indulgences and extensions which he could get from merchandise creditors, he would pull through, did he?” Answer. “Who said that?”

Question. “B. L. Rouse.” Answer. “No, I don’t think he put it in that way; he said that he would have no difficulty with Mr. Henry Rouse, who held \$17,000 of the notes of the Rouse & Hills Company; that with the \$15,000 of additional money that he was to borrow at the bank, he would pay off something like \$15,000 or \$18,000 of bills payable, at maturity; that his sales would enable him to take care of his accounts payable as they matured, with such extensions as he could get by the giving of notes.”

Question. “You testified before: ‘I recall the \$18,000 item and that he wanted about \$15,000 to take care of these items, stating that if that were provided, he would have no difficulty out of his sales to take care of the accounts payable, with such indulgence as he could get in that way?’” Answer. “That is what I now say.”

Question: “Then the fact that he would still require extensions from merchandise creditors was talked of at that time when this loan was under consideration?” Answer. “I don’t think that question of asking for indulgence or extensions in that way was discussed; it was the right that he had as a dealer, as a purchaser from the jobber or manufacturer, or whatever it was, to his cash discount if he saw fit to pay cash, or the giving of a four months paper, perhaps if he did not care to pay cash; it was simply a right that he had.”

Question “Did you use the expression ‘such indulgence as he could get?’” Answer. “Well, such indulgence as was given him or he had a right to by giving paper.”

Question. “Indulgence is not a right, is it?” Answer. “Possibly not, strictly speaking.”

Question. “Did you learn from him then that he was asking extensions of merchandise debts that had become due?” Answer. “No, sir, I did not.”

Question. “And that he has been for some time trying to obtain extensions?” Answer. “No, sir, I did not.”

Question. "Did you make any inquiry on that subject?"
Answer. "I think not."

Question. "You contemplated that he should continue in business as he had before?" Answer. "No, sir, not as he had before; I assumed that he would continue business and that there would be no necessity for any considerable purchase of merchandise until Mr. Rouse's return."

Question. "I do not know what considerable means; you contemplated that he would make purchases?" Answer. "To a very limited extent, I think."

Question. "You took no action to limit purchases, did you?"
Answer. "Yes, I think Mr. Wilson was quite particular to emphasize that matter."

This evidence to our mind shows that until Mr. Rouse returned, it was supposed by the mortgagees that the Rouse & Hills Company were carrying on business, but that, owing to the state of its stock on hand, it would have no occasion until Mr. H. C. Rouse's return, to obtain credit to any considerable extent. Mr. Rouse did not return as soon as he was expected and the period of holding these chattel mortgages was for that reason extended beyond what was contemplated when they were given and this led to more extensive purchases by the company than was contemplated by the mortgagees when they received their security. Then bearing upon the question of filing these mortgages, this question was asked of Mr. Goff:

"Now, Mr. Goff, did you not in your experience of such matters, know that if you and he filed this mortgage covering all property then or thereafter existing, of the Rouse & Hills Company, or made its existence known, and the existence of the assignment of the accounts, that that would end the transaction of business by that company in its capacity to get credit?" Answer. "I think I knew if the mortgage was filed, that that would bring about a closing-down of the business. I think that would necessarily follow."

Question. "And all the accounts, present and future, had been assigned, and yet you say that nothing was said there by you or Mr. Dustin or Mr. Wilson or Mr. B. L. Rouse or Mr. Smith on the subject of the effect of making known this mortgage, do you?" Answer. "I recall nothing that was said; it was certainly understood between us, that until Mr. Rouse returned, which was expected in the latter part of March, that in

1916.]

Cuyahoga County.

order to accomplish what was desired so as to keep that a going concern until Mr. Rouse's return to the city, that there should not be publicity given."

This is the only testimony that I find in the case, that hints very closely upon any arrangement between the mortgagor and the mortgagees to withhold these mortgages from record, and it is the only thing from which the purpose and intent of the withholding of the mortgages might be inferred to extend to the credit of the company. He distinctly states that he remembers nothing that was said on the question of withholding but he says that it was understood by Rouse and Smith representing the mortgagees that, in order to accomplish what was desired, they would give no publicity until the return of Mr. H. C. Rouse.

To our minds the evidence shows in addition to what I have already said: That this arrangement of giving the mortgages on account of the confidence that B. L. Rouse had that H. C. Rouse would give the company all the financial aid it needed upon his return, that these mortgages were given, as, in a measure tentative in their character, to hold the matters of the company in its then condition or as they would be after using the money got by the loan until the return of Mr. H. C. Rouse. There was no purpose in withholding the mortgages to injure any creditors that might in the interim sell goods to the company, or renew obligations: nor was there any agreement to withhold the mortgages from record. The only purpose in withholding them was, not to extend the credit of the company, but to prevent creditors, already existing, from so pressing the company that it would be obliged to meet its obligations, not in the ordinary course of business, but by all bringing pressure at once upon it, and this is what we understand this testimony to mean.

And we find from the facts, that the mortgages were not withheld from record with any fraudulent intent or purpose, nor was it *supposed* or *believed* by the mortgagees that withholding from record would be the means of extending the credit of the company, for their belief was that until Mr. Rouse returned,

there would be no occasion for the company to make any purchases to any considerable extent.

Much of the law that has been cited upon this question is where there has been a *fraudulent intent* in withholding the mortgage from record or withholding where it was known by the mortgagee that others *would* give extensive credit and would be misled by such withholding—which the courts have construed to be a fraudulent withholding. In this case we think that *that* law is not applicable to the facts as found by us.

In this state it is, we believe, the law that even under such state of facts, the creditors who have extended credit in the interim between the taking and filing of the mortgage can not be preferred to the mortgagee unless they have, in some way, seized the property or obtained a lien upon it, but we do not see that this question is involved under the facts in *this* case.

It is contended by counsel for plaintiff that the withholding from record, although not with the intent at the time the mortgage is given of extending the credit of the mortgagor, yet, if while the mortgage is being withheld, the mortgagee becomes aware of the fact that the mortgagor is having extended to him credit and he still does not file his mortgage, that will work an estoppel upon him on the ground that he has not acted when he was called upon to act and hence can not assert his rights as against one who has been misled by his not acting.

A consideration of the cases in this state, is found in 112 Fed. Rep., 301, *In Re Shirley*. In that case, Judge Day has reviewed carefully many of the decisions of the state of Ohio, and we think his conclusions are well founded, and it will not be necessary for us here to consider them any further than they are considered in that case. Judge Day says that there can be no estoppel in the absence of fraud and in the case he was then considering, he had found that there was no actual fraud, although the mortgage had been withheld by reason of an agreement between the mortgagor and the mortgagee that it should be withheld from the record. And Judge Day says this proposition is true: That there can be no estoppel in the absence of fraud if the mortgagee simply held his security void until filed, as against creditors who were at full liberty to assert their rights against

the property. The mortgagor had an undoubted right to prefer creditors by giving to one a security denied to others. When the chattel mortgage is filed, it becomes such preference only from the date of filing; until filed, it is void as to creditors. While this term is used without limitation in the statute, as construed by the Ohio Supreme Court it means such creditors as have fastened upon the property *before* the filing of the mortgage. All other creditors must assail the security for fraud in order to defeat the preferences. And he says that the cases holding a contrary doctrine are from states with different statutes, or where the Supreme Court has given a different construction to a similar statute.

It is contended by counsel for plaintiff that, outside of the statute and the construction given to it by the Supreme Court, the doctrine of estoppel obtains in these cases; that the decisions of Ohio on the construction of the statute are not adverse to holding that a mortgage withheld from record as this was, will estop the party from asserting it as against those who became creditors of the mortgagor while the mortgage was thus withheld. Many cases are cited to us in which it is claimed that this doctrine is held.

We are cited to *Dobson v. Snyder*, 70 Fed. Rep., 10. In that case the court found a design and intent on the part of the bank for whose benefit the mortgage was given and the mortgagor to shield and benefit the latter at the expense of some one else. That case is not applicable to the facts we find in this.

In California, as found in *Ruggles v. Cannedy*, 53 Pac. Rep., 911, the court construes the statute pertaining to mortgages in connection with the statute in regard to sales and places the matter of record of mortgage on the same ground and makes it a substitute for the delivery of the goods in a sale, and construes their statute to mean that unless the mortgage is recorded, it is absolutely void as to all creditors.

A number of cases have been cited from Missouri, and that state seems to hold that unless the mortgage is left for record as contemplated by the statute it is void as to any one who has been misled, to his injury.

In 123 Mo., 141, it is held that such a mortgage, as a matter of law, is void as to creditors, where the mortgage was withheld for the purpose of not impairing the mortgagor's credit.

Cases cited from Michigan show that a mere withholding of the mortgage from record will work an estoppel against the mortgagee under the statute of that state as to chattel mortgages, although such withholding is done without any fraudulent intent.

In 137 Ind., 175, the court found the conveyance fraudulent in its inception, and that the withholding was one step in carrying out the fraud, and the conveyance was held fraudulent.

In Iowa the courts hold that the withholding must be with a fraudulent intent in order to give subsequent creditors preference over the mortgagee.

The courts of South Dakota hold the same as Michigan and so does the 20th Fed. Rep. And the same doctrine is held in the 29th Fed. Rep., 566. In 12 Wash., 190, the holding is in the same line as in the states of Michigan and South Dakota; and Arkansas holds also the same.

In 73 Wis., 354, it is held that the withholding by agreement with the mortgagor makes it fraudulent as to intervening creditors, and cites 67 Wis., 101, as holding the same doctrine.

In 92 Ala., 443, the holding is, that a mortgage purposely withheld from the record lest it might injure the mortgagor's business and credit is fraudulent as to intervening creditors and to any one who gives up a security prior to the mortgage.

In 17 B. Mon., 779, it is held that if it is withheld by an arrangement or agreement, it can not prevail over a trustee for creditors.

The case cited from 50 Neb., 54, is one where the mortgage was held by agreement, with fraudulent purpose, of both parties to the mortgage, and it was held in that case that it was fraudulent as against creditors.

In 53 N. J. Eq., 350, the court of that state construes the chattel mortgage act to make a mortgage, not left for record, inferior to all creditors whether before or after the mortgage and whether they be judgment creditors or not.

1916.]

Cuyahoga County.

We do not find that any of these courts intended to make a holding on the doctrine of estoppel entirely independent of a construction of the statute of chattel mortgages in the state; although, in some of them, the statute is not mentioned by the court in connection with what it says on the ground of estoppel, yet the court, we believe, intends to say in all of them, that the chattel mortgage act is such that if the mortgagee withholds the mortgage either by agreement or by neglect to record it for any other reason, the statute can not protect the instrument, and the doctrine of estoppel will arise. But the courts of Ohio have not so construed our statute; and I need not cite the decisions in this state, as they are referred to in Judge Day's opinion in *Re Shirley, supra*.

These mortgages were upon goods, among other things, where the mortgagee was left in possession and left free to transact business with the goods the same as though the mortgages were not given. Hence, under the authority in this state (*Francisco v. Ryan*, 54 O. S., 370), as to that class of goods, the mortgage would have been of no effect even if filed against creditors who obtained liens upon the property, and the property mortgaged being largely of this nature, there was nothing to be gained in filing the mortgages. They would have accomplished but one purpose and that would be to make all creditors proceed at once to collect their claims from the company.

It is held in the last case cited, that a mortgage of this nature constitutes a valid contract for a lien on such after acquired property, and possession thereof lawfully taken by the mortgagee has the same effect of protecting it in his hands from the claim of the mortgagor's creditors as has possession taken of the property owned by the mortgagor at the time of the execution of the mortgage.

It is the holding of the court that the mortgages in question are prior in right as to the property acquired by them to that of the creditors, whether their claims arose prior to the mortgage or after the same was given. A decree may be drawn accordingly.

**MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO
TAKE FIRE INSURANCE.**

Circuit Court of Cuyahoga County.

C. H. PRESCOTT, JR., ET AL V. HARRY KOBLITZ.*

Decided, February 16, 1903.

Evidence—Inspection Bureau Rate of Insurance Not Admissible to Prove Average Rate in Force on Certain Class of Property—Damages for Breach of Executory Contract is Present Value of the Contract.

1. In an action by an insurance agent for damages resulting from the breach of a contract, in which it had been agreed that the agent should furnish the other party to the contract insurance at a rate not exceeding the average rate paid by other lumber firms of the same city for a like hazardous risk, evidence by the officers of an inspection bureau as to the rate which they placed upon the property upon which the plaintiff had tendered insurance, is not competent to prove that the tendered insurance was at the rate specified in the contract, even though the rates fixed by the bureau were sold to, and used by, a large percentage of the insurance agencies of the community.
2. Where a contract between an insurance agent and a property owner provided that the property owner should take all his insurance from the agent and withhold 20 per cent. of the premiums as they became due and apply them as payment upon a certain piece of property which was to be conveyed to the agent at an agreed price, a breach having occurred at the inception of the contract through the refusal of the property owner to take any insurance, the measure of damages is not the value of the property to be conveyed, but the value of the contract to the agent at the date of the breach, in estimating which the jury should consider the probability of the defendants going out of business, and what would have been necessary on the part of plaintiff had he performed his contract.

Hessenmueller & Bemis, for plaintiffs in error.

Ford, Snyder, Henry & McGraw, contra.

MARVIN, J.; WINCH, J., and HALE, J., concur.

*Affirmed without opinion, *Koblitz v. Prescott et al*, 71 Ohio State, 546.

1916.]

Cuyahoga County.

Error to the court of common pleas.

The defendant in error brought a suit against the plaintiff in error, to-wit, C. H. Prescott, G. A. Prescott and C. H. Prescott, Jr., partners doing business under the firm name of the Saginaw Bay Company, and recovered a judgment, to reverse which the present proceeding is brought. The suit grew out of the following state of facts:

On the 19th day of September, 1899, a contract in writing was entered between the Saginaw Bay Company as party of the first part and Harry Koblitz as party of the second part, which contract reads as follows:

“This agreement made this 19th day of September, 1899, by and between the Saginaw Bay Co., party of the first part, and Harry Koblitz, party of the second part. Witnesseth:

“That whereas the party of the first part is now engaged in the lumber business in the city of Cleveland, and desirous of placing the fire insurance upon their lumber yards, etc., with the said party of the second part: therefore the conditions and considerations under which the said insurance is to be placed with the party of the second part are as follows:

“First. That the insurance shall be placed with first class and reliable insurance companies.

“Second. That the rate of insurance shall not exceed the average rate paid by other lumber firms in the city of Cleveland for a like hazardous risk.

“Third. That the party of the first part agrees to place all of their insurance with the party of the second part until the terms of this contract are fulfilled; the party of the first part agrees to sell to the party of the second part a certain piece of land situated in Bay City Mich., at the corner of Fifth and Johnson streets the same having a frontage of about 133 feet on Fifth and a depth of about 100 feet on Johnson street the deed and abstract for this property showing the same to be free from all encumbrance to be furnished at the time payment has been made as here specified. The party of the second part agrees to allow 25 per cent. on all premiums as they fall due to remain with the party of the first part as payment on the above described property. Also the party of the second part agrees to allow 20 per cent. on all premiums to remain with the party of the first part on all premiums due for insurance if placed for C. H. Prescott & Sons, Tawas City, Mich. It is also a part of this agreement that the party of the second part shall pay to the party of the first part interest at the rate of 6 per cent.

on all deferred payments, said interest commencing November 1st, '99. It is also understood that on and after November 1st, '99, the party of the second part shall collect all rents due on the above described property and shall pay the taxes as they mature, except the payment due in January, 1900, which shall be paid by the party of the first part. Also it is mutually understood that the party of the first part will accept payment for the property at any time the party of the second part may have an opportunity to dispose of same and the terms of this agreement will still continue until contract is fulfilled. The purchase price agreed upon for the above described property is \$3,000 which shall be paid in the manner above described until \$1,500 has been paid on the principal, leaving a balance of \$1,500 still to be paid. After that time this contract shall be in force providing the said second party is able to place the insurance at equally as good rates for the party of the first part as other reliable agencies can place same, and in case second party is not willing so to do, the balance due on said property amounting to \$1,500 shall be paid for in cash and this agreement shall be closed, although it is expected and desired that this arrangement may be so mutually satisfactory that the business relations may continue until full payment is made. It is also agreed that the party of the second part shall do his utmost to secure a blanket rate on all of the property at the separate yards of the Saginaw Bay Co., and shall also aim to secure the best rates possible at all times, and that there may be no misunderstanding in regard to the rates to be paid, it is expressly agreed by the party of the second part that at no time shall the party of the first part pay a higher average rate than is paid by other lumber firms in the city of Cleveland for a like hazardous risk.

(Seal.) "SAGINAW BAY CO.,
"Per C. H. PRESCOTT, JR.
(Seal.) "HARRY KOBLITZ.

"Witness:

"KATHERINE C. KEELEY."

The petition avers that Koblitz has performed all the conditions of said contract on his part to be performed, and, as the policies of the defendants have from time to time expired, plaintiff has offered to place the insurance in accordance with the terms of said contract, but that defendants have refused and still refuse to place insurance with the plaintiff or place plaintiff in possession of the real estate aforesaid, and have wholly and utterly

1916.]

Cuyahoga County.

failed to carry out said contract or any part thereof, whereby he has been damaged in the sum of \$3,000, and he prays for judgment for said sum, with interest from the 19th day of September, 1899.

For answer to the petition the defendants admit that they are a partnership doing business under the name of the Saginaw Bay Company, and that they entered into the contract with said Koblitz hereinbefore set out, and they deny every other allegation in the petition.

A bill of exceptions is filed in this court setting out all the evidence introduced in the court below, together with the charge of the court as given to the jury.

From this it appears that no insurance under this contract was ever placed upon the property of the Saginaw Bay Company, nor was the real estate described in the contract ever conveyed, or the possession thereof delivered to the said Koblitz.

The claim on the part of the plaintiff below is that he was ready and able on his part to place such insurance, but that the defendant refused to accept it, whereas the claim on the part of the plaintiff in error is that Koblitz never offered to place any insurance for them at the rate named in the contract, and that the real reason why insurance from him was not accepted by them was that the rate charged by him was in excess of (to quote from the language of the contract) "the average rate paid by other lumber firms in the city of Cleveland for a like hazardous risk."

The evidence shows that the first insurance which was needed by the plaintiff in error after the date of said contract was on the 27th day of September, 1899, being eight days after the date of the contract. On this date insurance to the amount of \$43,000 on the lumber-yards of the plaintiff in error was to expire, and they notified Koblitz of that fact. He, together with his partner, Mr. Thomas, made an examination of the property to be insured, and it is claimed on the part of the plaintiff in error that Koblitz then fixed a rate which he said was the lowest rate at which he could place the insurance, and that such rate was, on the most hazardous risk, \$1.60 per hundred, and on the least hazardous, \$1.50.

An important question in the case, therefore, it will be seen, was "the average rate paid by other lumber firms in the city of Cleveland for a like hazardous risk." As bearing upon this question, the plaintiff below placed upon the stand several witnesses to show what rate had been fixed upon such risks by an organization called "The Ohio Inspection Bureau." Among the witnesses placed upon the stand for this purpose was one Charles H. Patten, the superintendent of said "Ohio Inspection Bureau." This witness, in answer to the question, "What is the business of that company?" answered, "Well, it is an independent rating concern that operates similar to Dun's or Bradstreet's. We inspect all classes of insurable property in Cleveland and sell our rates to the agents." From this and other evidence it appears that this Ohio Inspection Bureau employed experts to examine property, with a view to fixing rates at what they think property should be insured, and for a compensation they furnish these rates to insurance agents in the city of Cleveland. The evidence shows that this organization furnished their estimate of rates to a large per cent.—indeed to nearly all of the insurance agents in the city of Cleveland. These rates so fixed by the inspection bureau were given out on cards furnished to the several agents, and the witness, Patten, speaking of the rates fixed by this bureau in force at the time of the execution of the contract between the parties to this action, was asked by counsel for the plaintiff below this question: "Now, on the stock of lumber, shingles, posts, timber, piling sticks and foundations for lumber piles, its own or held in trust or in commission or sold, but not delivered, all while contained in its yard and sheds, bounded by Stone's levee, Toronto, Ohio, and Chicago streets, Cleveland, Ohio. It is understood that this item covers like property while piled temporarily on said levee and streets. Other concurrent insurance permitted," being the third item in this plaintiff's Exhibit B, "what rate, if any, for the fall, particularly September, 1899, as fixed by you, was then in effect." This was objected to, overruled, and the proper exception taken. The answer was, "The rate was \$1.60." Then, this question: "Now, on the other items of property owned by the Saginaw Bay Com-

1916.]

Cuyahoga County.

pany in this city, what, if any, rate did you fix at that same time?" and over the objection and exception of the defendant below, the witness answered, "Well, there was a rate of \$1.50 in effect prior to that." Then, the question: "What was the rate in effect in September and October and November, 1899?" and over the objection and exception of the defendant below the witness answered, "\$1.50."

Other questions of similar import were put to these and to other witnesses, for the purpose of ascertaining what rate of insurance was placed by this inspection bureau upon the property of the Saginaw Bay Company and other similarly hazardous risks, which was in effect in the fall of 1899. The ruling of the court in admitting this class of testimony was erroneous, and the testimony was calculated to prejudice the rights of the plaintiff in error. The contract required that the defendant in error should furnish the insurance at a rate not exceeding the average rate paid by other lumber firms in the city of Cleveland for a like hazardous risk. Surely, this could not be determined by ascertaining what this bureau, or any expert acting for this bureau, should say would be a proper rate for such insurance.

It, of course, became necessary for the court to charge the jury as to what would be the measure of damages in the event that there should be a recovery for the plaintiff below, and on that subject the court said to the jury:

"The measure of damages, if you find for the plaintiff under the instructions of the court, is the value of the house and lot plus the rentals after the payment of taxes, after deducting from said rental that part of the purchase price which plaintiff's commission did not cover, and interest on the unpaid portion of the purchase price of the house and lot. The time for which such rental, taxes and interest should be taken into account is the period which the parties contemplated for the performance of the contract."

It should be said, before discussing this proposition, that the evidence shows that the commissions which the plaintiff below would receive from the insurance companies upon the premiums paid for the insurance to be furnished, was 20 per cent., so that the amount which was to be kept out of the premium toward

payment upon the real estate named in the contract was in excess of the commissions which Koblitz would receive from the insurance companies for his services to the extent of 5 per cent. of such commissions. This would be true as to all insurance written upon property in the city of Cleveland, and the evidence showed nothing as to insurance at Tawas City, Michigan, the other place named in the contract. Attention is called to this because of the language of the charge quoted: "deducting from said rental that part of the purchase price which plaintiff's commission did not cover." This charge as to the measure of damages was clearly erroneous and to the prejudice of the plaintiffs in error. If this rule were followed plaintiff would recover all that he could have recovered if everything to be done by him had been done and if the plaintiffs in error had neglected and refused to put him in possession of the real estate at the time specified in the contract and refused to convey it to him after it had been fully paid for. So that Koblitz would have received, without doing anything on his part except to tender, as he claims he did, on the 27th day of September, 1899, insurance to cover the \$43,000 which was then about to expire; all that he would have received had he performed all the work which, under the terms of the contract, he was required to perform. It assumes that nothing remained for him to do; that he would not have been required to make any inspection of the risks from time to time as policies were to be issued; that he would not have been required to ascertain at what rate other like hazardous risks were being taken by other good companies; that he would not have been required to secure companies to take the risks from time to time as they should have been needed by the Saginaw Bay Company—all of which he certainly would have been required to do had the contract been carried out on the part of both. It further assumes that he would always have been prepared to furnish insurance such as his contract required, at the rates required by his contract; that the business of the company would have continued for so long a time as that his commissions would have amounted to \$3,000.

The jury were not permitted to estimate what the probabilities were as to contingencies which might arise to prevent Koblitz

1916.]

Cuyahoga County.

from performing his part, or to make it unnecessary for the Saginaw Bay Company to have insurance. Surely, all of these things would have a bearing upon the damages which were sought by Koblitz, if he sought any by reason of the failure of the plaintiffs in error to perform their part of the contract. If by default of the plaintiffs in error Koblitz was prevented from carrying out his contract and receiving the benefits of it, and if he was ready on his part to perform, then the damages which he should recover would be what that contract was worth to him. It may be somewhat difficult to fix upon a practicable rule to determine such damages, but it seems certain that the rule fixed by the court in its charge was not the true rule.

The case of *Rightmore v. Emil Hirner et al*, 188 Pa. St., 325, is, in many respects not unlike the case under consideration. Rightmore entered into a contract with Hirner and others to sell certain machines manufactured by Hirner and his associates at a given commission for a period of five years. At the end of the second year from the making of the contract Rightmore was dismissed from his employment and brought suit to recover damages for a breach of the contract. The trial court said to the jury upon the measure of damages:

“This contract had practically three years to run, and if they deprived him of that benefit they ought to pay what that contract was worth, and that is the profit which he would have gotten out of it.”

This instruction was held to be erroneous, and the court say that what should have been given to the jury as the measure of damages, is:

“If the plaintiff is entitled to any damages for breach of contract, the measure of the damage is the value of the contract at the time of breach, and in considering the value the jury must bear in mind that the defendants were not obliged to furnish any specified number of machines, or even continue their manufacture; the plaintiff's right under his contract were subject to the contingencies of business, depression of trade, which might tend to reduce the sales, and in estimating the damages consequent upon the loss of the contract, the jury must take into consideration what the plaintiff probably could earn in some other

employment or occupation during the period during which the contract ran.”

Applying the principle announced in this case, which seems to be the true principle, the measure of damages to which Koblitz was entitled, if he was entitled to damages, was the value of the contract to him at the time of the breach, and, in considering the value, the jury should bear in mind that the defendants were not obliged to furnish an specified amount of insurance in any year, nor was it obliged to continue in business for any fixed length of time. The plaintiff's rights under his contract were subject to the contingencies of business, the probability of his being able to furnish the insurance for the whole length of time which it would take to pay for the real estate under the terms of the contract, and what would be the value of Koblitz's service and time in doing what he would have been required to do to carry out the contract for the whole time which it was to run.

To make out the case of the plaintiff below it was necessary for him to show that he was prepared to perform on his part and that the defendant below prevented such performance.

It is certain that after the 27th of September, 1899, neither party did anything toward the carrying out of the contract. Just prior to that time interviews were held between them, and a letter was written by Koblitz to the company and an answer to that letter written to Koblitz. The parties are not at one as to what transpired at the interviews. Koblitz says that he fixed no rates at which the insurance which was needed on the 27th of September would be furnished, though he says that it is true that his partner, in his presence, marked the rate of \$1.60 opposite to one of the risks as it was written out on a slip of paper. The defendants below, C. H. Prescott, Jr., and G. A. Prescott, testify that both Mr. Koblitz and his partner, Mr. Thomas, stated that the best rates they could make for the insurance then wanted was \$1.60 on one risk and \$1.50 on the other. Mr. Koblitz in rebuttal denies this. Mr. Thomas was not called in rebuttal.

It is not denied but what both by letter and in the last interview between the parties to this suit, which took place in Sep-

1916.]

Cuyahoga County.

tember, 1899, the plaintiffs in error declined to have anything further to do with Koblitz under the contract, and unless they were justified in so refusing they should respond to him in damages, but we think the evidence fails to show that he offered to furnish insurance at such rates as would not be above the average rates paid by other lumber dealers on like hazardous risks at the time. We find nothing to indicate that he ever suggested that for the time being he would furnish insurance at less than the rates fixed by this inspection bureau, and we think it clear that this was above the average rate paid on like risks which were considerably below the board rates, the only rates at which Koblitz seems to have offered to furnish any insurance.

Counsel for defendant in error urge, both in oral argument and in brief furnished, that the answers made by the jury to interrogatories propounded to them are such that if any error was committed by the court, either in the rulings upon evidence or the charge to the jury as to the measure of damages, such errors were in no wise prejudicial to the plaintiff in error. It is perhaps doubtful whether these interrogatories with their answers are properly before us. They do not appear in the transcript nor in the bill of exceptions, beyond the fact that the court said to the jury, at the close of the charge:

“The plaintiff has submitted certain interrogatories, which interrogatories you will answer as you find the facts to be from the evidence, and have each interrogatory signed by your foreman.”

Then follows one interrogatory only. And the court said to the jury:

“You will answer these questions from the evidence, and your foreman will sign the answer after each one in the space for that purpose, and you will also answer the other questions submitted. They are numbered from 2 to 14. Number 1 is stricken out.”

We find among the files a paper with the number and name of the case in typewriting upon the back of such paper, followed by the word “Interrogatories,” and then written with a pen

are the words "Filed April 28, 1902." There is nothing other than these words to indicate by whom they were filed or where they were filed; but treating them as properly before us, they do not relieve the errors which we find were committed from prejudice to the plaintiff in error. The first question which appears to have been answered by the jury reads: "Were not other lumber firms in this city then paying on like hazardous risks the same rates as those offered by plaintiff to defendants?" This is answered, "Yes." The fact that some other lumber firms were paying on like hazardous risks the rates at which the plaintiff below offered to furnish insurance to the plaintiffs in error would not be sufficient to show that he was offering to furnish insurance at the rates provided in his contract. The next question which was answered, reads: "What other lumber firm or firms in this city besides the defendants paid a less rate of the premium for fire insurance in September, 1899, on a risk or risks of equal hazard with the defendants." The answer is "No, none." We think the evidence did not justify this answer. The next three questions are based upon the one just quoted. The next: "What was the value of the house and lot which defendants contracted to sell to plaintiff?" The answer is: "\$3,000." The fact that this answer was justified by the evidence does not relieve the charge as to the measure of damages from prejudice to the plaintiffs in error, if the views expressed in this opinion as to the true measure of damages are correct. The next three are answered in accordance with the views of this court as to the evidence, but do not affect what has already been said as to the introduction of evidence on the measure of damages. The answers to the next three are not inconsistent with the position taken here by the plaintiffs in error.

The last question reads: "Did defendants' failure to furnish plaintiff with the information mentioned in question No. 11 prevent plaintiff from tendering policies of insurance as required by his contract?" The answer is, "Yes." If it is meant by this to say that this was the only thing which prevented the defendant in error from tendering the policies, it is not justified, we think, by the evidence.

1916.]

Hamilton County.

For error upon the admission of evidence and in the charge of the court, and for the reason that the verdict is not sustained by the evidence, the judgment of the court of common pleas is reversed.

**PLAINTIFF'S REMEDY IN A SUIT AT LAW RATHER THAN
FOR SPECIFIC PERFORMANCE.**

Court of Appeals for Hamilton County.

FISHER-BARKDULL FARM AGENCY V. HARRY M. CREAGER.

Decided, November 8, 1915.

*Specific Performance—Denied After Conveyance to Another of the
Land Claimed by Plaintiff.*

Where it appears that prior to the bringing of an action for specific performance of a contract to exchange one tract of land for another, the plaintiff had knowledge both actual and constructive that the defendant had already conveyed the land sought in exchange to a third party, the court will not retain the case for assessment of damages, but will relegate the plaintiff to an action at law.

DeCamp & Sutphin and L. J. Brumleve, for plaintiff.

H. J. Buntin, for defendant.

JONES (Oliver B.), J.

This is an action to enforce the specific performance of a contract to exchange a tract of land in Cincinnati for a tract of land in Florida. The contract provided for an even exchange of the two properties.

Before this suit was filed the defendant had sold and conveyed to a *bona fide* purchaser all of the Cincinnati land which under said contract was to have been exchanged with plaintiff company for the Florida land. This sale was consummated and the deed of conveyance left for record with the recorder of Hamilton county, Ohio, three days before the filing of the suit, and constructive notice thereby given to plaintiff. The agent

and attorney of plaintiff were both personally told by defendant that she had so sold her land, two days before the filing of this suit. Plaintiff therefore had both constructive and actual notice that it would be impossible for defendants to specifically perform their contract. The purchaser of the Cincinnati land is not made a party to the suit nor is any claim made that the sale was not made to him in good faith.

“Specific performance can not be decreed of an agreement to convey property which has no existence or to which the defendant has no title; and if the want of title was known to the plaintiff at the time of beginning the suit the bill will not be retained for assessment of damages.” *Kennedy v. Hazelton*, 128 U. S., 667 (9 Sup. Ct. Rep., 202; 32 L. Ed., 576).

Plaintiff was fully advised before bringing this suit that defendants had conveyed away their title and that the contract could not be specifically performed. Under these circumstances the case would not be retained by the court for the assessment of damages, but must be dismissed, and plaintiff relegated to an action at law where its remedy is adequate. *Jones v. Tunis*, 99 Va., 220; *Kerlin v. Knipp*, 207 Pa. St., 649; *Eastman v. Reid*, 101 Ala., 320; *Public Service Corporation v. Hackensack*, 72 N. J. Eq., 285; *Mack v. McIntosh*, 181 Ill., 663; *National Tube Co. v. Tube Co.*, 3 C.C.(N.S.), 459.

As the case, however, was heard on evidence and fully argued both orally and by brief, it might be stated that even if the land were still owned by defendants and subject to a decree for specific performance, that in the opinion of this court plaintiff corporation has failed to show that it would be entitled to such decree. And taking the land of plaintiff at its own valuation it would not appear that it has suffered any damage in failing to exchange it for that formerly owned by defendant.

Petition of plaintiff dismissed at its costs.

JONES (E. H.), J., and GORMAN, J., concur.

1916.]

Hamilton County.

CONSTRUCTION OF A BOND OF INDEMNITY.

Court of Appeals for Hamilton County.

THE SUPREME COUNCIL OF THE ROYAL ARCANUM V. EMMA
SANDAU FOLZ ET AL.

Decided, March 29, 1915.

*Pleading—Conditions of the Bond Sued on Discovered by Search of the
Record at Hearing on Demurrer—Liability of Sureties on Bond of
Indemnity Against a Claim in Litigation Together With Counsel
Fees and Other Expenses.*

1. While in an action to enforce a bond it is not competent, on demurrer to the petition, to look to the bond attached thereto for the purpose of determining whether liability has arisen thereunder, nevertheless a reviewing court, upon searching the record and ascertaining from a prior pleading the conditions of the bond claimed to have been breached and there set out *in haec verba*, may adjudge whether the default alleged is within the condition of the bond.
2. Where the condition of a bond is that the obligee shall be held blameless on account of a certain claim in litigation, together with counsel fees and other expenses, the indemnity promised covers only the amount the obligee is compelled to pay by legal proceedings, and does not include counsel fees and other expenses incurred in defeating said claim.

Edwin J. Howard, for plaintiff in error.

Kinhead & Rogers, for E. S. Folz.

Adam A. Kramer, for Eleanora C. Alms and Williams Alms.

GORMAN, J.

The action below was one to recover upon a bond executed by William Sandau as principal, and William H. Alms and Frederick H. Alms as sureties, in favor of the plaintiff in error.

Plaintiff in error, a fraternal benevolent association, had issued a certificate in the sum of \$3,000 upon the life of Frederick H. Sandau. At his death the certificate was presented for payment and at that time the wife of Frederick H. Sandau, Lillian

Sandau, made claim for the money payable under the certificate. It appeared that there had been a former certificate issued by defendant in error on the life of Frederick H. Sandau payable to Lillian Sandau, his wife. This certificate had not been taken up and canceled, but a new certificate was issued upon the life of Frederick H. Sandau, payable to his brother, William Sandau. This brother, William Sandau, paid the premiums during the lifetime of Frederick H. Sandau, and presented this certificate for payment upon his death. Thereupon, plaintiff in error stated that Lillian Sandau, the widow of Frederick H. Sandau, made claim to the fund. Plaintiff in error finally agreed to pay the \$3,000 to William H. Sandau upon condition that he execute a bond of indemnity to the plaintiff in error, which bond was accordingly executed, a copy of which is attached to the petition and made part thereof.

A demurrer was sustained to the petition, and thereupon an amended petition was filed setting out many facts, and attaching a copy of the bond to the amended petition, and making it a part thereof.

The defendant, Emma Sandau Fols, as executrix of the estate of William Sandau, deceased, demurred to the amended petition for the reason that same did not state facts sufficient to constitute a cause of action. Eleanora C. Alms, administratrix of the estate of Frederick H. Alms, and Eleanora C. Alms individually also demurs to the amended petition, as did William H. Alms. Their demurrers also were upon the grounds that the amended petition did not state facts sufficient to constitute a cause of action. The demurrers to this amended petition were sustained, and the plaintiff not desiring to plead further or amend the amended petition, the defendants were all dismissed, with their costs.

Error is prosecuted to this judgment of the court below in sustaining the demurrers to the amended petition.

The copy of the bond attached to the amended petition is as follows:

“Know all men by these presents.

“That we, William Sandau, as principal, and William H. Alms and Frederick H. Alms, as sureties, all of Cincinnati, Ohio,

1916.]

Hamilton County.

are held and firmly bound unto the Supreme Council of the Royal Arcanum, a corporation duly established under the laws of the Commonwealth of Massachusetts, in the sum of Three Thousand (\$3,000.00) Dollars, to be paid to the said Supreme Council of the Royal Arcanum, its successors or assigns, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

“Signed by us this 17th day of February, A. D., eighteen hundred and ninety-seven.

“The condition of the above obligation is such that whereas, the Supreme Council of the Royal Arcanum, on the 12th day of October, 1893, issued its benefit certificate No. 141,020, to Frederick H. Sandau, a member of Hoboken Council No. 99, Royal Arcanum, located at Hoboken, N. J., payable upon the death of said Frederick H. Sandau, to his brother William Sandau;

“And whereas, the said Frederick H. Sandau departed this life on June 30, 1896, and due proof of his death has been furnished to the said Supreme Council of the Royal Arcanum;

“And whereas, all of the assessments, dues and payments required under said certificates have been duly paid since the issuance thereof by the said William Sandau;

“And whereas the said Frederick H. Sandau died without leaving any children, but leaving Lillian Sandau as his widow;

“And whereas the said Lillian Sandau claims some interest or ownership in said certificates, or the amount payable thereunder by reason of the existence of a prior certificate, and the said William Sandau claims to be the sole beneficiary under said certificate, and that the said widow has no right, title or interest in or to said certificate, and is desirous of collecting the amount payable thereunder, and the said Supreme Council of the Royal Arcanum is willing to pay the same to him, provided it is indemnified against any claim or interest to which the said Lillian Sandau is or may be entitled;

“And whereas, in consideration of the payment of the amount due under said first named certificate by the said corporation to the said William Sandau, the said William Sandau has agreed, and does hereby agree, in case the said corporation shall ever be called upon or required through any legal proceedings to pay to the said Lillian Sandau any sum of money whatever under said certificate or any prior certificate issued by said corporation to said Frederick H. Sandau or by reason of or under the membership of said Frederick H. Sandau in said Hoboken Council No. 99, that he will on demand pay to said corporation, the said sum, together with such counsel, court and witness fees and

other expenses as it shall reasonably incur in connection with the claim of said Lillian Sandau or any person claiming by, through or under her and will fully reimburse the said corporation in any sum and all sums it shall be thus obliged to pay said Lillian Sandau and in all such fees and expenses as aforesaid.

"Now, therefore, if the said William Sandau shall fully keep and perform his said agreement; then this obligation shall be void; otherwise it shall be and remain in full force and effect.

"WM. SANDAU (Seal.)

"FRED H. ALMS (Seal.)

"WM. H. ALMS (Seal.)

"Executed in our presence:

"JOHN FRED. THELER,

"WM. STEGNER.

"State of Ohio, County of Hamilton, ss:

"Be it remembered that on the 17th day of February, 1897, personally appeared before me, the undersigned Notary Public in and for Hamilton County, Ohio, duly commissioned and qualified, William H. Alms and Frederick H. Alms, the parties mentioned in the foregoing instrument, and acknowledged the signing and sealing thereof to be their voluntary act for the uses and purposes therein mentioned.

"In testimony whereof, I have hereunto subscribed my name and affixed my Notarial seal at Cincinnati, Ohio, this 17th day of February, 1897.

"JACOB KRAMER,

"Notary Public in and for Hamilton County, Ohio."

Now it will be seen from a perusal of this bond that William Sandau agreed in case the corporation should ever be called upon or required through any legal proceedings to pay the said Lillian Sandau any sum of money under said certificate or any prior certificate, or by reason of the membership of said F. H. Sandau in said corporation, he, William Sandau, would on demand pay to said corporation the said sum, together with such counsel, court and witness fees and other expenses as it shall reasonably incur in connection with the claim of said Lillian Sandau, and will fully reimburse the corporation in any sum and all sums it shall be thus obliged to pay to said Lillian Sandau and in all such fees and expenses as aforesaid.

The amended petition discloses that suit was brought by Lillian Sandau against the plaintiff corporation in the circuit

1916.]

Hamilton County.

court of Hudson county, N. J., to recover the \$3,000 which she claimed under the certificate issued by plaintiff, or under a former certificate which was taken up and replaced by the one that was in existence at the time of the death of her husband, Frederick H. Sandau. This cause was pending for many years in the New Jersey court, and a judgment was finally rendered on December 13, 1911, in favor of the plaintiff in error, the Supreme Council of the Royal Arcanum, and the action of Lillian Sandau was dismissed and she recovered no sum whatsoever. Three thousand dollars was paid to William Sandau upon the execution of the bond.

Plaintiff in error avers that it incurred expenses amounting to \$142.76 for taking depositions and testimony in said case in New Jersey, which sum was paid by William Sandau in his lifetime, and it also incurred an expense of \$496.33 as attorneys fees for defending said cause in New Jersey, said sum having been charged by one W. O. Apgar, and attorney, and that the same were reasonably worth the amount of his charges. Plaintiff in error therefore prays judgment against the defendants in error on said bond in the sum of \$496.33.

The question submitted to the court below, and also to this court, is what is the construction to be placed upon this bond. It is contended by counsel for plaintiff in error that the principal, William Sandau, and the sureties on the bond were obligated to pay counsel fees, court costs and witness fees, and other expenses connected with the claim of Lillian Sandau, whether she recovered a judgment or not; while counsel for the sureties and Mrs. Folz, the widow of Sandau, claim that the condition of the bond is such that they were not required to pay except where there was a recovery against the plaintiff in error in favor of Lillian Sandau, in which event they were to pay under the bond the amount of recovery, together with the court costs, attorney fees, witness fees and other expenses.

It may be that it was the intention of the parties to draw a bond to indemnify the plaintiff in error against any loss or expenses which it might incur by reason of the claim of Lillian Sandau, whether her claim was successful or unsuccessful, but

as we read this bond we are of the opinion that the condition of the bond is such that the principal and the sureties thereon were not obligated to pay to the plaintiff in error any sum whatsoever unless it was required to pay by legal proceedings.

Now the amended petition discloses that the plaintiff in error was not required to pay anything to Lillian Sandau in the court proceedings, and therefore plaintiff in error has no claim upon the principal and sureties upon this bond, because it was not called upon or required to pay Lillian Sandau, by legal proceedings or otherwise, and it was only in the event that the plaintiff in error was required to pay by legal proceedings that counsel fees, witness fees, court fees and other expenses were to be paid. The language of the bond is that he will on demand "pay to said corporation the said sum, together with such counsel, court and witness fees," etc., as it shall reasonably incur in connection with the claim of said Lillian Sandau. Said sum refers to the money which the plaintiff in error may be called upon or required to pay to Lillian Sandau by legal proceedings, and it was only in the event that it was required to pay this sum that the plaintiff in error could call upon the principal and the sureties on this bond to pay a sum other than counsel fees, witness fees and court costs. The position of plaintiff in error was that William Sandau, or Lillian F. Sandau, the widow of Frederick Sandau, was entitled to \$3,000, and it was desirous of protecting itself against the payment of this sum twice. William Sandau was anxious to receive the \$3,000, but if it should be adjudged in a legal proceeding that Lillian Sandau was entitled to the money, then he was to refund the \$3,000 paid to him by the plaintiff in error.

We do not think that the principal and the sureties on this bond obligated themselves to pay court costs, witness fees, counsel fees and other expenses, if Lillian Sandau failed in her legal proceedings to recover from the plaintiff in error. We think that the plain language of the bond calls for no other construction, if we take into consideration the words "together with such counsel and witness fees" in connection with that which precedes the words. It will be manifest that it was only in the event that plaintiff in error was obliged to pay to Lillian F. Sandau, that

1916.]

Hamilton County.

William Sandau was to reimburse plaintiff in error for the amount which it was obliged to pay to Lillian F. Sandau, and then counsel fees, court costs, witness fees, etc., were also to be paid. This conclusion is further strengthened by the words "fully reimburse the corporation in any sum and all sums it shall be *thus* obliged to pay said Lillian F. Sandau and in all such fees and expenses as aforesaid." The word "thus" refers to the obligation of the plaintiff in error to pay to Lillian F. Sandau by legal proceedings and not otherwise.

The amended petition having disclosed that the plaintiff in error was not required or called upon by legal proceedings to pay Lillian F. Sandau, but on the contrary was discharged by legal proceedings from any liability to her, plaintiff in error was not in a position to call upon the principal and sureties on this bond to pay any counsel fees, court costs, witness fees or other expenses incurred in that litigation. The obligation to pay counsel fees—and that is all that is involved in this case—would only follow the recovery of a judgment in favor of Lillian Sandau against the plaintiff in error, or the requirement by some legal proceeding upon the part of the plaintiff in error to pay Lillian Sandau a sum of money.

The amended petition sets out that plaintiff declined to pay William Sandau, upon his demand, the \$3,000 provided in said certificate, unless said William Sandau should indemnify it by giving it a good and sufficient bond to hold it harmless from loss or liability that it might be called upon or required to pay said Lillian Sandau under said certificate or under said prior certificate and from any loss by reason of the payment by it of any counsel fees, court fees, witness fees and other expenses incurred in connection with the claim of said Lillian Sandau, etc., and to reimburse plaintiff in any sum or sums it should be obliged to pay said Lillian Sandau and from any loss by reason of the payment of any counsel fees, court fees, witness fees and other expenses incurred as aforesaid in connection with the claim of said Lillian Sandau *irrespective of whether or not any judgment was rendered in favor of said Lillian Sandau or against the said Supreme Council of the Royal Arcanum.*

The above underscored words are not in the bond executed; nor does plaintiff aver that they are set out in the condition of the bond. All that is averred with reference to the condition of the bond is that plaintiff declined to pay the \$3,000 *unless* William Sandau would execute a bond containing the conditions averred. It fails to state that *such a bond was executed*. It then avers, after the averments above set out, that William Sandau executed and delivered to plaintiff his certain bond in the sum of \$3,000 signed by him as principal and William H. Alms and Frederick H. Alms as sureties, a true copy of said bond being hereto attached and marked "Exhibit A" and made a part hereof. Plaintiff utterly fails to set out the conditions which the plaintiff demanded should be incorporated into the bond. This was not sufficient in our opinion; but it should either have averred that *the conditions demanded to be incorporated into the bond, were made a part of the bond*, or he should have set out the condition of the bond *in haec verba*, as it did in the original petition.

By its failure to do this we are of the opinion that its amended petition was fatally defective as against the demurrer.

This case was argued and briefed in this court by all the parties, on the theory that the copy of the bond attached to the amended petition is a part of the petition. We have doubts as to whether or not the copy of the bond is a part of the amended petition under the decisions construing Section 11333, General Code, but are inclined to the opinion that it can not be considered a part of the amended petition.

Unless the demurrer searches the record so as to enable us to look at the original petition, which does set out the condition of the bond *in haec verba*, we would not be warranted in holding that the condition of the bond has not been broken or that the terms and conditions thereof are such as preclude a recovery by plaintiff under the averments of the amended petition. There are authorities which hold that on a demurrer to a pleading the court may search the record and look to a similar prior pleading filed by the same party to determine whether or not a judgment should be given against the party whose pleading is first de-

1916.]

Hamilton County.

fective in substance. *Trott v. Sarchett et al*, 10 O. S., 242; *R. R. Co. v. Mowatt*, 35 O. S., 284, 286; *Johnson v. Pensacola R. R. Co.*, 16 Fla., 623.

For these reasons we have thought is not improper to express our views on the construction to be given to the bond and the condition thereof, and so considering this aspect of the case, we have expressed the opinion that there is no liability under this bond, under the pleadings filed in the case.

The judgment of the court of common pleas will therefore be affirmed.

JONES (Oliver B.), J., concurs.

JONES (E. H), P. J., dissenting.

The court can not look to the exhibit as a part of the amended petition (*Crawford v. Morrison*, 27 O. S., 421; *Olney v. Watts*, 43 O. S., 499). In the latter case the court said:

"If the exhibit could be looked to, as a part of the petition, perhaps it does appear, but the exhibit is no part of the pleading and does not help it out. We are therefore compelled to lay out of view what counsel on both sides seem to concede in argument that we should consider on this demurrer; that is, what appears in the exhibit attached to the petition but not made a part of it."

The plaintiff in the case before us in its petition undertakes to make the exhibit a part of it, but that does not help the pleading. We must determine the sufficiency or insufficiency of a pleading from its "direct averments." *Olney v. Watts, supra*.

Without reference to the bond sued upon and attached to the petition, the pleading states a cause of action, and the demurrer for that reason is not well taken.

But the majority of this court decides the case as if the bond is a part of the amended petition, and it was so argued by counsel. The bond is only evidence, and a copy is required by statute to be attached to the petition. If, upon trial, the evidence does not support the petition, plaintiff must fail; but we can not look to evidence, oral or documentary, in the consideration of a demurrer to the petition.

But since counsel, the lower court and the majority of the members of this court, have looked upon the demurrer as calling for a construction of the bond upon which the claim of plaintiff rests, I must express my disapproval and dissent from the judgment thereon.

The bond given by Sandau and his sureties provides that if the obligee is ever called upon through legal proceedings to pay to Lillian Sandau any sum of money under any certificate issued to Frederick H. Sandau, they will pay to it on demand said sum together with such counsel, court and witness fees and other expenses as it shall reasonably incur *in connection with said claim of said Lillian Sandau, and fully reimburses it in any and all sums it shall be thus obliged to pay her and in all such fees and expenses.* At the time this bond was given, the plaintiff had been called upon by Lillian Sandau to pay to her the amount of the certificate, so that there were in fact two claimants for the fund. It was to protect the plaintiff company that the bond was given.

The interpretation placed upon this bond is unreasonable. The bond is self-explanatory and expresses the agreement between the parties in clear and unmistakable language. Admitting the genuineness of the bond and the allegations of the amended petition, the plaintiff has a right to recover in this action. To hold otherwise involves so many absurdities and inconsistencies as to cast aspersion upon the intelligence and even upon the sanity of the contracting parties. It means that they contracted that if the obligee who was to defend the suit made a weak defense and lost the case, it was to profit thereby, because in such a proceeding the costs and expenses would not be as great as in a case where capable counsel were employed and a determined effort made to succeed. In the event the case was lost, as a result of feeble and indifferent defense, the Supreme Council, under the terms of the bond, would on demand be paid the expenses incurred; but if by vigilance and industry it won the case, it must pay all expenses. It must be admitted that by such a misconstruction, the bond induces negligence, offers a reward for perfidy, and places a premium upon inaction and default.

1916.]

Stark County.

**PAYMENTS VOLUNTARY AND OTHERWISE ON CLAIMS
FOR NECESSARIES.**

Court of Appeals for Stark County.

JOHN HAAS V. GEORGE HAAS.

Decided, February 8, -916.

*Necessaries—Voluntary Payment on Written Demand Not a Bar to
Garnishment by Another Creditor—Purpose of the Statute Re-
lating to Personal Earnings.*

1. Voluntary payments made by a debtor from his personal earnings, on a claim against him for necessities, do not preclude an attachment and the subjecting of ten per cent. of such earnings to the payment of the claim of another creditor for necessities, notwithstanding demand had been made upon him in writing for such payment by the first creditor.
2. Voluntary payments made after such demand relieve the debtor from the consequences of suit and costs, the provisions of the statutes applying where an action is brought to reach the personal earnings of the debtor, and not to cases where voluntary payments are made without reference to prior or pending attachment proceedings.

J. W. Burris, for plaintiff in error.

Fisher & McCuskey, contra.

PER CURIAM (Shields, Powell and Houck, JJ.).

Proceedings in attachment were instituted before a justice of the peace to reach 10 per cent. of the personal earnings of the debtor for necessities. It appears that at the time such proceedings were commenced, the debtor was making voluntary payments of his personal earnings to another creditor for necessities, who had threatened to sue and garnishee his wages upon written demand made therefor. Such attachment was discharged by the said justice of the peace, and on an appeal taken to the court of common pleas, said court reversed the judgment of the said justice of the peace discharging said judgment and ordered

said case remanded to the said justice of the peace for further proceedings. Error proceedings are prosecuted to this court to reverse the judgment of said common pleas court.

By Section 10253, General Code, a remedy is afforded for the attachment of the personal earnings of a debtor when an affidavit is filed with a justice of the peace conforming to the requirements therein stated. This is the general provision provided by statute. Section 10271, General Code, as amended (103 O. L., 567), provides that:

“The personal earnings now exempted by law, in addition to the 10 per cent. for necessities, shall be further liable to the plaintiff for the actual costs of any proceeding brought to recover a judgment for such necessities, in any sum not to exceed two dollars and the necessary garnishee fee. Such garnishee may pay to such debtor an amount equal to ninety per cent. of such personal earnings, less the sum of two dollars and the necessary garnishee fee of not to exceed fifty cents, if the same is demanded by the garnishee, for actual costs as herein provided, due at the time of the service of process or which may become due thereafter and before trial and be released from any further liability to such creditor, or to the court or any officers thereof, in such proceeding, or in any other proceeding, brought for the purpose of enforcing the payment of the balance of the costs due in said original action. Both the debtor and the creditor shall likewise be released from any further liability to the court or any officers thereof in such proceeding or in any other proceeding brought for the purpose of enforcing the payment of the balance of the costs due in said original action.”

Section 10272, General Code, provides that:

“The person bringing an action for necessities first must make a demand in writing for the excess over and above 90 per cent. of the personal earnings of the debtor, and such demand shall be made at least three days and not more than thirty days before such action is brought by delivering such demand to the debtor personally, or by leaving it at the debtor's usual place of residence. No cost or expense shall be chargeable to the defendant debtor in such action if upon such demand he tenders payment in money or duly accepted order, within three days after such demand, for the excess of his personal earnings above 90 per cent. thereof.

1916.]

Stark County.

Section 10273, General Code, provides that:

“More than one such demand by the same creditor shall not be made at closer periods than thirty days. The amount demanded may be for the excess above 90 per cent. earned during the interval of thirty days. Any voluntary payment or payments made by the debtor during such interval shall be deducted from the amount which might be demanded had no payment or payments been made.”

Other statutory provisions follow with reference to the duties of the garnishee, but the foregoing sections will suffice for the purpose of this case. Related as they are to the same subject-matter, we may well assume that these several sections of the statutes are to be construed together to ascertain the object of their enactment, and when so construed the legislative intent, in our judgment, will not be difficult of solution.

The foregoing legislation was obviously passed in the interest of creditors furnishing necessities to persons whose personal earnings were theretofore protected by the exemption laws of the state, and while not saving to the debtor's family the full benefit of his labor, a small proportion of it is exacted by the laws to be applied towards satisfying the claims of the grocer or other person who may supply necessities for his table and household. Legislation of this character has gradually found place upon our statute books from time to time, until now it is provided by said Section 10271 that in addition to the per cent. of such earnings heretofore held liable for necessities, such earnings shall be liable for costs in a sum not to exceed two dollars in an action brought by a creditor on a claim for necessities.

The demand mentioned in said Section 10272, General Code, is held to be jurisdictional, hence unless such demand is made as therein required, if suit be brought, the attachment can not be maintained, for said section recites that “no cost or expense shall be chargeable to the defendant debtor in such action, if upon such demand he tenders payment in money or duly accepted order, within three days after such demand, for the excess of his personal earnings above 90 per cent. thereof.” It would

seem that this latter provision of said section was intended to relieve the defendant debtor from the consequences of a contested suit by the creditor. As will be seen said Section 10273 provides that not more than one demand by the same creditor shall be made at closer periods than thirty days. Grouping said sections together, then, we find that after written demand is made within the time stated, and in the absence of payment being made or tendered, or an accepted order given for the excess of the debtor's personal earnings above 90 per cent. thereof, suit may be brought therefor and a recovery had, together with the further sum of two dollars as costs, provided that no more than one such demand by the same creditor shall be made at closer periods than thirty days.

Here we have the question made whether one can make voluntary payments under a demand made for necessities, in the absence of suit, and thus absolve himself from complying with compulsory process issued by another creditor upon a claim for necessities furnished to the same defendant debtor while such voluntary payments are being made, at intervals of thirty days, or in other words, can such voluntary payments so made defeat a creditor from enforcing payment of his claim for necessities furnished in an action commenced by the latter while such voluntary payments are being made? Construing Sections 10271 and 10272 together it appears that the provisions of said sections were intended to apply to and become effective in cases where action is brought to reach the personal earnings of a debtor for necessities furnished, and not to cases where voluntary payments are made. Voluntary payments may be made, but not so as to defeat the rights of an attaching creditor under the statute, for if it were otherwise the provisions of the statute and what seems to have been the purpose of this legislation would be rendered ineffective and nugatory.

It follows that the judgment of the court of common pleas will be affirmed.

1916.]

Hamilton County.

ANSWER WRONGFULLY STRICKEN FROM FILES.

Court of Appeals for Hamilton County.

P. C. BERTRAM v. THEOBALD MUNFORD Co.

Decided, November 15, 1915.

Judicial Discretion—Abuse of, in Striking Answer from the Files—Pleading.

It is an abuse of discretion for a court to strike from the files an answer which was filed by leave, where no ground for so doing was shown except that at the time the answer was tendered and leave to file granted, a motion was pending for a default judgment and the answer set up only a general denial.

Reece & Reece, for plaintiff in error.*Cogan, Williams & Ragland*, contra.

GORMAN, J.

The record in this case discloses that an action was commenced by defendant in error before a justice of the peace to recover for goods sold and delivered, that judgment was rendered in favor of defendant in error and an appeal from said judgment was taken by plaintiff in error and a transcript filed in the common pleas court on December 26, 1913. On February 4, 1914, the defendant in error being in default filed a petition on appeal. On June 27, 1914, the plaintiff in error being in default asked and obtained leave to file an answer which was a general denial. Two days later, on June 29, 1914, defendant in error filed a motion to strike the answer from the files and for judgment. No grounds are set out in the motion for this action. On July 2, three days after the filing of said motion, the court granted the same, and the entry recited that it appeared to the court that at the time defendant tendered his answer and asked leave to file the same, a motion was pending on behalf of plaintiff for a default judgment, and it appearing to the court that said answer is a general denial, the court finds said motion to be well taken.

The entry granting leave to file the answer was set aside, and the answer stricken from the files.

On the same day, by a separate journal entry, the court entered judgment by default against plaintiff in error, defendant below. Exceptions were taken by plaintiff in error to these proceedings, and the cause is here on error to said judgments.

We think the court of common pleas erred in striking the answer of plaintiff in error from the files. No cause is shown for such a proceeding. The defendant below had secured leave of court to file his answer, a general denial, and no claim was made that there had been any impropriety or misconduct in securing leave to file the pleading. The record fails to show that there was a motion pending for a default judgment; but if there had been such a motion pending it was within the sound discretion of the *nisi prius* court to grant leave to defendant below to file an answer. There was no claim made that the answer was false or frivolous or filed as a sham pleading for the purpose of hindering or delaying plaintiff in the collection of his claim. Even if the court of common pleas in the exercise of a sound discretion could have stricken the answer from the files, the facts in this case show that there was an abuse of its discretion.

Judgment reversed and cause remanded for such proceedings as are authorized by law.

JONES (Oliver B.), J., and JONES (E. H.), J., concur.

1916.]

Fairfield County.

**JEOPARDY WHERE THERE HAS BEEN A PROSECUTION
FOR A LESSER OFFENSE.**

Court of Appeals for Fairfield County.

FRANK CROWLEY V. STATE OF OHIO.*

Decided, September Term, 1915.

Criminal Law—Same Action and Same Offense Distinguished—Prosecution for Assault Does Not Bar Prosecution for Assault with Intent to Commit Rape.

The offense of assault and battery and of assault with intent to commit rape are made by our statutes separate and distinct, and prosecution for the lesser and subsequently for the greater offense does not constitute a placing of the defendant in jeopardy twice for the same offense.

M. A. Daugherty and *M. A. Daugherty, Jr.*, for plaintiff in error.

Jas. A. Tobin, Prosecuting Attorney, and *C. C. Courtright*, contra.

SHIELDS, J.

On the 5th day of November, 1914, an affidavit was filed by one Nellie Finley against the plaintiff in error before one C. M. Rowlee, mayor of the city of Lancaster, in Fairfield county, Ohio, charging the plaintiff in error with committing an assault and battery upon the said Nellie Finley on the 4th day of November, 1914, to which said charge the plaintiff in error entered a plea of guilty, whereupon the said mayor sentenced the plaintiff in error to imprisonment in the work-house at Zanesville, Ohio, for the period of 120 days, and to pay the costs of prosecution, and said plaintiff in error was so imprisoned.

Afterward and at the January (1915) term of the court of common pleas of said Fairfield county, the grand jurors of said

*Affirmed by the Supreme Court February 29, 1916, 93 Ohio State.

county returned an indictment against the plaintiff in error charging that—

“Frank Crowley, on the 4th day of November, in the year of our Lord one thousand nine hundred and fourteen, at the county of Fairfield aforesaid, in and upon one Nellie Finley did unlawfully make an assault, and her, the said Nellie Finley, then and there unlawfully did strike and wound, with intent, her, the said Nellie Finley, violently, forcibly and against her will, then and there unlawfully to ravish and carnally to know.”

To this indictment a plea in bar was interposed by the plaintiff in error setting forth, in substance, that the state of Ohio ought not to prosecute said indictment against him because he says that the state of Ohio had theretofore procured and had judgment of conviction and sentence pronounced upon and against him for the same act, the same assault, and the same offense mentioned, described and pleaded against him in the same indictment, upon a plea of guilty to said affidavit before said mayor who had full and final jurisdiction to pronounce said final judgment and sentence and to cause the same to be fully carried out and executed, which was done; that the said Frank Crowley named in said affidavit is the same person named in said indictment, and that the said Nellie Finley upon whom the assault with intent to ravish and carnally to know was made as charged in said indictment is the same Nellie Finley upon whom the assault and battery is alleged to have been made as charged in said affidavit.

To said plea in bar, the state by its prosecuting attorney filed a demurrer, and upon a hearing had said court sustained the same. Thereupon a plea of not guilty was entered to said indictment and upon trial had the plaintiff in error was found guilty. A motion for a new trial being overruled, the plaintiff in error was sentenced according to law, to all of which proceedings of said court in sustaining said demurrer to said plea in bar and said judgment of conviction and sentence the plaintiff in error duly excepted, and by a petition in error filed in this

1916.]

Fairfield County.

court the plaintiff in error seeks a reversal of the judgment of said court of common pleas.

Several assignments of error are alleged in said petition in error as grounds for the reversal of said judgment, and while not waiving any of said grounds of error, the principal ground alleged and insisted upon in argument in behalf of the plaintiff in error was that his constitutional rights were invaded and violated by being twice put in jeopardy for the same offense. If the claim thus made finds support in the facts appearing in the record, it would seem that said judgment was unauthorized and that the same should be set aside, otherwise not.

Let us examine. The offense charged before the mayor of Lancaster was that of assault and battery based upon an affidavit of the injured party. Having complied with the order made and judgment entered by said mayor, it is contended by the plaintiff in error that this was a satisfaction of the judgment of the law and put an end to any further prosecution growing out of the same act and offense. That it was a satisfaction of a judgment duly rendered by competent authority upon the charge made admits of no doubt, but is the remaining question to be answered in the affirmative?

Article I, Section 10, of the late Amended Constitution provides that "no person shall be twice put in jeopardy for the same offense." The plea in bar raises the question, then, whether the indictment covers the same *act* and *offense* described in the affidavit filed with said mayor. If it does, it follows that the action of the court below in sustaining said demurrer to said plea in bar was prejudicially erroneous and that the judgment of said court should be reversed.

The statute, Section 12423 of the General Code, under which the affidavit was filed before the said mayor, reads as follows:

"Whoever unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, shall be fined not more than two hundred dollars or imprisoned not more than six months, or both."

The statute, Section 12421 of the General Code, upon which said indictment was predicated, reads as follows:

“Whoever assaults another with intent to kill, or to commit robbery, or rape upon the person so assaulted, shall be imprisoned in the penitentiary not less than one year nor more than fifteen years.”

It is not too much to say that a reading of the foregoing sections ought to enable us to ascertain the purpose of the Legislature, which alone has the power to create and define offenses, whether it was intended to describe one or more offenses of a like or different kind. The presumption is that the Legislature had in mind the purpose of describing different offenses. To convict under Section 12423 it is recognized that the employment of physical force only is generally necessary to be shown, while under Section 12421 an additional and higher degree of proof is required, involving, as it does, the question of criminal intent as one of the essential requisites for conviction of the offense therein described. One describes a misdemeanor and the other a felony. While each is a separate and complete offense in itself when made out by a certain degree of proof, a different degree of proof is necessary to sustain a conviction under the latter than under the former section, thus showing that the identity of the offenses described in said sections is not the same. We are therefore led to conclude, adopting the well established rule that the intention of the Legislature must govern in the interpretation of statutes, that it was the purpose of the Legislature to create two separate and distinct offenses in the enactment of these sections.

But it is argued on behalf of the plaintiff in error that it is held in certain jurisdictions that because of certain constituent elements being present in the two offenses that therefore the position assumed by the learned counsel for the plaintiff in error can not be successfully challenged. Our Supreme Court recently passed upon a case involving the question raised in the case here, in *State v. Rose*, 89 O. S., 383, and held that:

1916.]

Fairfield County.

“The provision of the Constitution relating to jeopardy is in the following words: ‘No person shall be twice put in jeopardy for the same offense.’ The offense charged in the information is not the same offense and does not include the offense charged in the indictment, and hence the defense of jeopardy must fail.”

Speaking for the court and specially referring to the feature of the case contended for by counsel, Judge Wanamaker says:

“To be in jeopardy there must not only be a sufficient legal charge, but a sufficient jurisdiction to try the charge.

“The words ‘same offense’ mean same offense, not the same transaction, not the same acts, nor the same circumstances or same situation. There is but one offense that is the same offense as ‘rape’ and that is ‘rape.’

“It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the constitutional provision requires that it shall be the ‘*same offense*.’

“Some courts have greatly expanded the natural and ordinary meaning of the words ‘same offense’ to include all lesser degrees that may be fairly included within the major charge.

“In all offenses against the person there must be in the first instance an assault. To such lengths have some courts gone as to hold that if the defendant had been in jeopardy of a single assault upon another person and subsequently such assault proved to be fatal, by reason of which he was subsequently indicted charged with murder, the defendant might thereupon successfully plead a former jeopardy, because necessarily included within the charge of murder or manslaughter was the charge of assault or assault and battery, with which he has been previously charged and as to which he has previously been in jeopardy. This doctrine, however, has not found favor in decisions of the Supreme Court of this state.”

While we think the decision in the foregoing case is decisive of the question raised here, and of this case, the following might be mentioned as sustaining said authority; *Gavieres v. U. S.*, 220 U. S., 338; *Morgan v. Devine*, 237 U. S., 632; *Freeland v.*

People, 16 Ill., 380; *State v. Littlefield*, 70 Me., 452; *Morey v. Commonwealth*, 108 Mass., 433; 3 Greenleaf, Section 36; 1 Chitty's Criminal Law, 452, 456; Bishop's Criminal Law (8th Ed.), Section 1053; 132 Pa. St., 372.

Recognizing that the test of identity of offenses is whether the same evidence is required to sustain them as laid down in the authorities cited, but one conclusion can be reached by this court concerning the action of the court below in sustaining the demurrer to the plea in bar filed by the plaintiff in error, and that is that such action was proper and affords no ground of error for which the judgment of said court should be reversed.

The judgment of the court of common pleas will, therefore, be affirmed, and said cause will be remanded for execution. Exceptions noted.

POWELL, J., and MERRIMAN, J. (sitting in place of Houck, J.), concur.

EVIDENCE AS TO PEDIGREE.

Court of Appeals for Hamilton County.

CHARLES McCUNE ET AL V. HANNAH HARTNETT LARKIN.

Decided, February 7, 1916.

Evidence—Where Relating to Pedigree the Finding of the Jury Will Not be Disturbed, When—Hearsay Evidence Competent, When.

A reviewing court will not disturb a finding as to pedigree, where the only objection comes from the heirs of a deceased wife claiming the estate of her husband under Section 8576, General Code, and it appears certain that the husband left heirs. Nor will the finding with reference to pedigree and the degree of relationship be disturbed because of the introduction of hearsay evidence.

Marston Allen, James E. Robinson and Otto Pfleger, for plaintiffs in error.

B. S. Murphy and Galvin & Galvin, contra.

1916.]

Hamilton County.

JONES (Oliver B.), J.

The real question to be determined in this case is to whom the real estate of William H. Seymour passed by descent. He died without issue, after the death of his wife. The brother of his wife by the full blood claimed to be the sole owner. The three half-sisters and the son of a deceased half-sister claimed to each be entitled to a share with this brother in this inheritance. All of said relatives of the deceased wife claim under the provisions of Section 8576, General Code, which casts the descent upon the heirs of the wife only on the entire failure of heirs of her husband under the three preceding sections of the General Code.

The court below found that the defendant in error was the grandchild of a sister of the mother of William H. Seymour, and was his only living heir at law, and next of kin. The record develops an interesting inquiry into the family history of William H. Seymour, and shows the descendants of his maternal grandparents, Jerry and Kate Murphy of Kilbruin Parish, county of Cork, Ireland. Plaintiff is clearly shown to be the sole survivor of this branch of the Murphy family. As the entire Murphy family of County Cork must be eliminated before any of the parties to the suit, other than defendant in error, could establish an interest in this property, the improbability of their success is manifest. In our opinion the findings of fact as made by the court are fully sustained by the evidence.

Numerous objections were made as to the admission of evidence. The rule as to the admission of hearsay evidence to establish pedigree is stated in 2 *Jones, Evidence*, Section 312, in which is found the following language:

“The law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest in the declarations of the person from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is therefore restricted to the declarations of deceased persons who were related by blood or marriage to the person, and therefore interested in the succession in question. From necessity, in cases of pedigree hearsay evidence is admissible.

But this rule is limited to the members of the family, who may be supposed to have known the relationship which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject. It is not every statement or tradition in the family that can be admitted in evidence. The tradition must be from persons having such a connection with the party to whom it relates that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

It is also well stated in the opinion of the court in *Fulgeron v. Holmes*, 117 U. S., 389, 397, as follows:

"The proof to show pedigree forms a well settled exception to the rule which excludes hearsay evidence. This exception has been recognized on the ground of necessity; for as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known to but few persons, it is obvious that strict enforcement in such cases of the rules against hearsay evidence would frequently occasion a failure of justice. * * * Traditional evidence is, therefore, admissible. The rule is that declarations of deceased persons who were *de jure*, related by blood or marriage to the family in question may be given in evidence in matters of pedigree. A qualification of the rule is that before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself. But it is evident that but slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy."

We fail to find any error prejudicial to plaintiffs in error regarding the admission of evidence.

It is also urged that the court erred in refusing the demand of plaintiff below for a jury trial.

1916.]

Hamilton County.

It was practically conceded by the parties that the party having title to the land must be considered as in possession of it, a receiver having been appointed by the court to care for the property until the determination of the title. The action was in the nature of a proceeding in chancery. It was brought as an action for partition. Partition is a civil action not triable by a jury (*McRoberts v. Lockwood*, 49 Ohio St., 374; *Swihart v. Swihart*, 7 C. C., 338). The fact that the title of plaintiff was denied by the answer did not oust the court of jurisdiction (*Perry v. Richardson*, 27 Ohio St., 110). The answer and cross-petition of Hannah Hartnett Larkin was in the nature of an action to quiet title, which is a civil action under the code, in which the parties are not entitled to a jury. Under the pleadings, therefore, it was not error in the trial court to refuse the demand for a jury. Nor do we find any other errors to the prejudice of plaintiff in error.

Judgment affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

**VIOLATION OF CITY ORDINANCE IN PERMITTING SIDEWALK
TO BECOME COVERED WITH ICE.**

Court of Appeals for Cuyahoga County.

AGNES FAGINS v. BLOCH REALTY COMPANY.

Decided, February 7, 1916.

Negligence—Of Pedestrian in Walking over Sidewalk Known to be Covered with Ice—Abutting Property Owner Not Deprived of the Defense of Contributory Negligence—By His Violation of a City Ordinance in Permitting the Ice to Accumulate.

An inference of wantonness or willful negligence on the part of an abutting property owner, in permitting the sidewalk in front of his premises to become covered with ice in violation of a municipal ordinance, can not be imputed and his defense of contributory negligence be thereby cut off in an action brought by one who went upon the walk, knowing its dangerous condition, and fell and was injured in so doing. Failure to obey the ordinance and permitting the ice to accumulate were co-incident but not different things and do not introduce the rule of willfulness.

A. H. Martin, for plaintiff in error.

Ford, Snyder & Tilden, contra.

GRANT, J.

In this proceeding we are asked to reverse the judgment of the court of common pleas, following a verdict directed by the court, upon the conclusion of the plaintiff's testimony.

As being substantially correct, we adopt as our own the statement of the plaintiff's brief as to the issues joined by the pleadings in the case as follows:

"Agnes Fagins, as plaintiff in the common pleas court, brought her action against the Bloch Realty Company, as defendant, and charged in her petition that the said defendant, being the owner and in possession of a certain tall brick building abutting on Walnut avenue, Cleveland, O., on January 26, 1915, had constructed and maintained a certain down spout on

1916.]

Cuyahoga County.

said building which was inadequate to and which failed to properly conduct the water from the roof of said building to the sewer, but permitted the water accumulating on said roof to overflow and flow down the outside of said down spout and to be discharged on the surface of the sidewalk on Walnut avenue and to flow across the sidewalk eastwardly therefrom to the gutter, and so flowing to freeze and form an accumulation of ice in ridges on said sidewalk—causing the same to be dangerously obstructed, all in negligent, wanton disregard of the laws and ordinances of said city. That on said date she, the plaintiff, while lawfully proceeding along said sidewalk as a pedestrian, in the exercise of due care, slipped and fell on said sidewalk, because of said icy obstruction and defect and suffered serious permanent injury to her right knee rendering her a permanent cripple. And charged that the defendant thereby had wantonly, negligently and in violation of the laws and ordinances of the city, inflicted said injuries upon her to her damage, and prayed judgment accordingly.”

The defendant in its brief says that the plaintiff’s statement of the facts which the testimony offered at the trial tended to prove, is also correct in substance; wherefore we adopt that also as ours, as follows:

“On January 26, 1915, at about 11:30 A. M., Agnes Fagins, plaintiff in error, a woman in her 57th year of age, was walking westward on the sidewalk on the north side of Walnut avenue, Cleveland, Ohio, ‘as carefully as she could’ in the business of collecting washings—she being a washerwoman—on her way to the Hanna Flats. Water accumulating on the roof of the Hanna Flats had backed up, the down spout being clogged and overflowed and instead of being conducted down the inner side of the down spout to the sewer, ran down the outside of the easterly down spout and was discharged upon the surface of the sidewalk and ran across the sidewalk to the street. In so doing it froze on the down spout and upon the sidewalk from time to time and caused an accumulation of ice, forming in ridges and unevenly across the sidewalk, being almost a foot thick or high at the side of the building at the end of the down spout and ranging from that thickness to three or four inches thick at the curb and extending entirely across the sidewalk from the building to the curb, and extending of the same width, eastwardly toward E. Twelfth street, from the down spout about

eight or twelve feet. The sidewalk from the building and down spout to the curb is about ten feet wide. A pedestrian, in order to avoid the ice, passing along said sidewalk going to said Hanna Flats would have to leave the sidewalk at a certain drive about twelve feet east of the down spout on the southeastwardly end of said flats and pass into the street outside of the curb and travel about eighteen feet before returning to the sidewalk to enter the building. This accumulation of ice which made the sidewalk unsafe and dangerous was permitted to remain for about five days after the attention of the defendant's manager was called to it and before plaintiff was injured by falling thereon.

"The attention of the defendant's manager was called to this accumulation of ice which made the sidewalk unsafe and dangerous about five days immediately prior to the day of the plaintiff's injury, but nothing was done to remedy said condition.

"When within a very short distance—'four or five steps'—or about 'three feet' of the Hanna Flats, the plaintiff slipped and fell on the accumulation of ice. She had gathered washings from the 'Hanna' for several years. She had passed over this sidewalk on the day before (Monday) several times. At the time of her injury observing the icy, uneven, rough, slippery condition of the sidewalk, she walked as best she could, being compelled to go after her work and being unable to stop. On Tuesday, the day of her fall, it was a little warmer than it had been, causing some thawing and a larger flow of water than on the preceding days. There was no other equally direct and convenient way to her destination open to plaintiff. She sustained, as a result of the fall, a very painful injury to her right knee and foot, rendering her prostrate, helpless and unable to walk. Also a painful, persistent swelling and inflammation and a fluid effusion in the bursa about the knee joint. A severe sprain and a tearing of the ligaments about the knee joint, a displacement of the two cartilages of the knee and a latent, quiescent, congenital, syphilitic taint in the blood was revived and rendered active and a necrosis of the head of the tibia ensued—rendering said plaintiff a helpless cripple, permanently incapacitated from using her right leg and from following her usual vocation.

"The defendant, the Block Realty Company, owned and was in possession and control of the building, the Hanna Flats, and maintained the down spout from which the water came, which frozen caused the said icy condition on the sidewalk on which plaintiff fell.

1916.]

Cuyahoga County.

“Sections 670 and 241 of the building code of Cleveland, make it a misdemeanor, punishable by a fine and imprisonment to, in any case, permit the discharge of water from the roof of a building upon and across the sidewalk.”

The judgment complained of was entered after a motion by the plaintiff for a new trial had been made and overruled.

A single question, therefore, arises upon this record for our determination—having a proper regard for all that the testimony relevantly tends to prove, when brought to bear upon the issue joined, and allowing for all proper inferences to be deduced from it, still was there anything fit to go to the jury in support of a verdict for the plaintiff? Whatever the trial judge may have remarked as to the controlling state of the law in Ohio upon which he took the case from the jury, the justification for doing so is to be found, if at all, in the admitted facts that the plaintiff came to her injuries from going into a place of danger plainly visible to her at the moment and which she might without difficulty have avoided. And this is no more than saying that her hurts were brought upon herself as the result of her own negligence causing or materially contributing to them.

And, if such is the rule, we think she fairly brought herself within its application, concretely, to her case. She testified that the icy condition of the sidewalk was plainly to be seen when she went upon it and was injured, and that it was so to her knowledge the day before, when also she had occasion to pass that way several times.

Such being the admitted fact, the case seems to be governed by *Schaefer v. Sandusky*, 33 Ohio St., 246, of which the syllabus is as follows:

“A person who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, can not be regarded as exercising ordinary prudence, and, therefore, can not maintain an action against the city to recover for injuries sustained by falling upon the ice, even if the city would otherwise have been liable.”

There is nothing more in the facts in the case at bar that should have sent it to the jury than there was in the one just

cited. In that case the controlling facts were disclosed by the answers of the jury to certain special interrogatories sent to them, as follows:

“Q. Did plaintiff see and know the nature and character of this obstruction before and at the time of passing over it? And did he, knowing this, voluntarily pass over it? A. He did.

“Q. Could he have easily avoided it, either on the same walk, in the street, or on the opposite side, or on any other sidewalk, and reach his destination? A. He could have avoided it.”

On these findings the court in that case rendered judgment for the defendant, although the general verdict was for the plaintiff. And the Supreme Court upheld the judgment.

Here, the same facts were established by the admissions of the plaintiff, a result certainly not less satisfactory than the findings of a jury.

The rule stated has been followed by the Supreme Court in *Conneaut v. Nacf*, 54 Ohio St., 529, and in *Norwalk v. Tuttle*, 73 Ohio St., 242, as well as in numerous affirmed circuit court cases. It must, therefore, be regarded as the settled law of the state in this respect, conclusive in the case before us, and properly applied by the trial court.

In the case at bar the negligence of the plaintiff, contributing to her injury, was so far the efficient cause of that injury that but for it she would not have been injured, and by the exercise of ordinary care for her own safety she could have avoided the injurious consequences of the initial negligence of the defendant company. See remarks of Williams, J., in *Schweinfurth v. Railway*, 60 Ohio St., 215, at p. 222, quoting with approval *Thompson on Negligence* to the effect we have just stated.

It is, however, claimed by the plaintiff that the doctrine has no application where the circumstances are such that a jury might find from them that the conduct of the defendant in permitting the sidewalk to become covered with ice contrary to law should raise an inference of wantonness or wilfulness and bring that as a dominating issue of fact into the controversy. The

1916.]

Cuyahoga County.

contention at this point is that the unlawful negligence of the defendant amounted to a reckless disregard of the plaintiff's right to a safe passage over the sidewalk, which made wilfulness the controlling ingredient of legal wrong and took the ordinary doctrine of contributory negligence as a decisive factor out of the case. Such is the argument, which is fortified by extensive citations of authorities.

This doctrine is shortly but completely stated in 7 Am. & Eng. Enc. Law, 443 (2d Ed.), thus:

"The doctrine of contributory negligence has no application in cases where the injury is inflicted by the wilful act or omission of the defendant; in such cases contributory negligence is not a defense and, in its legal sense, can not exist.

"Wilfulness and negligence are the opposites of each other, the one signifying the presence of intention or purpose, the other its absence."

And in 1 *Sherman & Redfield, Negligence*, 64, it is said:

"It is universally conceded that the greatest contributory fault, including a wilful trespass, is no defense in an action for wilful injury."

And it is contended that when the efficient cause of the injury—in this case an ice covered sidewalk—is brought about by the disobedience of an ordinance on the part of the defendant, wilfulness is thence to be imputed to it as a matter of law, conclusively, to the effect of cutting off the defense it might otherwise have of contributory negligence on the plaintiff's part. At least, it is said, it was a question for the jury. An examination of the authorities brought forward to support this contention, leads us to the conclusion that the doctrine, applied to the case in hand, is unsound. The rule seems to be limited to cases where the initial fault of placing himself in a place of peril was that of the plaintiff, and where the resulting injury arose from the defendant's reckless and wanton act or omission—amounting in law to wilfulness—then first coming into the situation and bringing about the hurts complained of. Here, the

failure to obey the ordinance did not come into the case as the direct cause of the injury, as an intervening agency primarily responsible for it; it was there in the first instance as a usual and ordinary manifestation of negligence, and the fact that it at the same time was a violation of an ordinance was a coincidence and not an independent basis of recovery. Because the omission to obey the ordinance and the permitting of ice to accumulate in the first place were coincident but not different things, does not, as we think, introduce the rule of wilfulness in the case. The line of distinction seems nebulous at first glance, but it exists and is perceivable from an analysis of the cases cited in the briefs.

Upon the plaintiff's testimony we think there was nothing to go to the jury and that the verdict was properly directed.

No error having intervened, the judgment complained of is affirmed.

MEALS, J., and CARPENTER, J., concur.

1916.]

Lucas County.

TERMINATION OF GUARDIANSHIP.

Circuit Court of Lucas County.

BENJAMIN F. RENO V. GEORGE R. LOVE ET AL.*

Decided, December 2, 1911.

Guardian and Ward—Attempt by Ward to Usurp Prerogative of Guardian—Discharge of Insane Patient from Hospital Does Not Terminate Guardianship—Presumption as to Jurisdiction of Probate Court.

The discharge of a patient from a hospital for the insane neither vacates an order of the probate court appointing a guardian for said patient, nor provides a basis for impeaching the appointment in a reviewing court, in the absence of an affirmative showing in the record of resignation or discharge; and where the patient subsequent to his release from the hospital files an action in his own name for damages against those who procured his incarceration, it is not error on the part of the court in which the action was brought to substitute the guardian as the party plaintiff and permit him to dismiss the action.

Benjamin F. Reno, in person.

C. S. Northup, for the defendants served with process except defendants Chambers and Hurlbut.

KINKADE, J.

Mr. Reno brought an action in the court of common pleas against a large number of defendants to recover damages for his illegal arrest and illegal confinement for over four years in the Toledo State Hospital for the insane. Some of the defendants were state officials, some were county officials and all were charged with having conspired and combined to accomplish the arrest and imprisonment mentioned.

One of the defendants filed a motion in the case asking the court to substitute Thomas Biddle, guardian of Mr. Reno, as plaintiff. This motion was heard and granted. Mr. Biddle

*Affirmed without opinion, *Reno v. Love et al*, 88 Ohio State, 623.

thereupon dismissed the action. Reno objected to the substitution and dismissal of the action and preserved his exception in due form. He now files a petition in error, with bill of exceptions containing all the evidence heard on the motion, in this court to reverse the judgment of the court of common pleas in dismissing the action.

The trial court on hearing the motion had before it the affidavit of Mr. Reno and the testimony of two physicians, both of whom said Mr. Reno was insane. The trial judge stated the question of the plaintiff's sanity or insanity was not an issue on the hearing of the motion, and that the only question before the court was whether the Probate Court of Lucas County had, before the commencement of the present action, appointed Mr. Biddle as guardian of Mr. Reno, and whether this guardianship had been terminated in any manner provided by law. Thereupon Mr. Reno, as shown by the bill of exceptions, admitted in open court that the records of the Probate Court of Lucas County, Ohio, did show that Mr. Biddle had been appointed by that court as his guardian prior to the filing of the petition in this case, and that said records did not show that such guardian had resigned or had been discharged by the probate court. At the same time Mr. Reno informed the trial court that the records of said probate court also showed that prior to the beginning of this action, he had been discharged from the state hospital for the insane. Thereupon the order of substitution and dismissal was made.

The plaintiff in error claims that the evidence before the trial court as shown in the bill of exceptions failed to show affirmatively that the probate court had jurisdiction over his person when the appointment of Biddle as his guardian was made, and hence he was at liberty in this action, although admitting as he did that the records of the probate court did show the appointment, to treat the action of the probate court as a nullity and wholly disregard it. He further contends that even if this proposition be not correct, still his guardian was discharged by reason of his own discharge from the hospital and hence the guardianship no longer had any force.

We can not agree with either of these propositions. His discharge from the hospital could not of itself terminate the guardianship. The guardian may have been appointed on grounds other than those on which Mr. Reno was sent to the hospital, but whether this be so or not, a discharge from the hospital can not be held as vacating the order of the probate court appointing the guardian. Section 11010, General Code, which corresponds with Section 6311, Revised Statutes, provides the manner in which guardians may be discharged and reads as follows:

“Section 11010. When the probate judge is satisfied that an idiot, imbecile, or lunatic, or a person as to whom guardianship has been granted as such, is restored to reason, or that letters of guardianship have been improperly issued, he shall make an entry upon the journal that such guardianship terminate. Thereupon it shall cease, and the accounts of the guardian be settled by the court.”

The position taken here in argument that the judgment and orders of the probate court are not attended by the presumption that the court had jurisdiction to enter them (nothing to the contrary appearing in the record), and that the judgments and orders of the probate court may be collaterally impeached, is equally untenable. The law of Ohio on this subject is clearly stated in the case of *Shroyer v. Richmond*, 16 Ohio St., 455. I quote paragraphs six and seven of the syllabus:

“6. The probate courts of this state are, in the fullest sense, courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered.

“7. Hence, an order appointing a guardian, made by a probate court, in the exercise of jurisdiction, can not be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it.”

The Supreme Court has several times followed this decision. See *Hoffman v. Fleming*, 66 Ohio St., 163; *Fisher v. Lanning*,

76 Ohio St., 189, 198; *Union Sav. Bank & Tr. Co. v. Telegraph Co.*, 79 Ohio St., 89, 100.

The admission in open court by Mr. Reno, as shown in the bill of exceptions, fully justified the court in ordering the substitution of Biddle as plaintiff in the action. This being true, it follows there was no prejudicial error in allowing Mr. Biddle to dismiss the action. We express no opinion on any other matter involved in the action as brought. The judgment of the court of common pleas will be affirmed.

WILDMAN, J., and RICHARDS, J., concur.

**CIRCUMSTANCES UNDER WHICH ASSIGNMENT AND DELIVERY
IS NOT A GIFT IN PRAESENTI.**

Circuit Court of Cuyahoga County.

THE AMERICAN TRUST COMPANY v. IDA M. VINCENT AND NORTON
T. HERR, ADMINISTRATOR OF THE ESTATE OF
JOHN G. MILLER, DECEASED.

Decided, December 24, 1903.

*Gifts—Gifts In Praesenti are Invalid When Not Accompanied by Un-
conditional Delivery.*

Where, at the same time that life insurance policies are assigned and delivered to a person, the assignor executes and delivers to the assignee his promissory note due with interest at a fixed time after date, and at the same time an agreement is executed in which it is recited that the assignor has borrowed from the assignee the amount for which the note is given and assigned to her certain insurance policies as collateral security, which were to be hers absolutely in case the assignor died before the assignee—*Held*: The three acts constitute one entire transaction of a commercial nature, and that the assignment and delivery of the insurance policies does not amount to a gift *in praesenti*.

M. B. & H. H. Johnson, for plaintiff.

Norton T. Horr and White, Johnson, McCaslin & Cannon,
contra.

1916.]

Cuyahoga County.

WINCH, J.; HALE, J., and MARVIN, J., concur.

The controversy in this case is between the defendants, Ida M. Vincent, claiming a fund arising from insurance policies on the life of John C. Miller, deceased, as a gift made to her by said Miller in his lifetime, and the defendant, Norton T. Horr, administrator of the estate of said Miller, claiming the same fund as part of the assets of said estate.

The claim of Ida M. Vincent is set forth in her cross-petition in the following language:

“This defendant is the widow of Clinton A. Vincent, who had been the son-in-law of said John C. Miller, and who was from the time of his marriage with the daughter of the said John C. Miller, throughout the lifetime of the said daughter and thereafter, during the inter-marriage between this defendant and the said Clinton A. Vincent, looked upon and treated by the said John C. Miller and his wife, Martha, as though he were their natural son, and from the time of the inter-marriage of this defendant with the said Vincent, she was looked upon and treated by the said John C. Miller and his wife, until the latter died, and until the death of the said John C. Miller, as though she were in truth and in fact their daughter by blood, and she, in all respects conducted herself toward them, and each of them, as though she were their natural daughter, and there were many interchanges of good offices and kindness and affection between the said John C. Miller and his wife and this defendant.

“On the 14th day of April, 1898, said John C. Miller requested this defendant to lend him the sum of two thousand dollars, as a matter of friendship and kindness. This defendant was then a widow, in poor circumstances, with minor children, of whom she was the only support, and this two thousand dollars was two thousand dollars coming from insurance upon the life of her late husband, said Clinton A. Vincent, and belonging to her and her children.

“Owing to the friendly relations existing between the said John C. Miller and this defendant, she lent him said two thousand dollars, taking from him his promissory note, payable five years after date, bearing interest at the rate of six per cent. Said John C. Miller was then sixty years of age, and in good health. He was the owner and holder of three policies of insurance upon his life; one in the Connecticut Mutual Life Insurance Company for four thousand dollars; one in the Provident Savings & Life Insurance Company for one thousand dollars, and another in the same society for two thousand dollars.

“Said John C. Miller, in consideration of said loan, and of the friendship and affection existing between him and this defendant, then agreed to transfer absolutely to this defendant said three policies—the same to be hers absolutely; but in the event of her dying before said Miller, then said Miller should have the right to redeem said policies by paying to her estate, the sum of two thousand dollars.

“Said Miller thereupon, on said date, executed and delivered to this defendant absolute assignments, in due form, of all three of said policies and said Miller and this defendant also on that date signed a written agreement, which was intended to, and, as this defendant believes, does express the agreement hereinbefore set forth.

“At the same time said Miller delivered to this defendant said three policies, and they have remained in her possession ever since, with the exception about to be stated.

“Said assignments were at once transmitted to the respective companies, and approved by them. The amount so loaned to the said Miller was more than enough, as this defendant believes, and avers the fact to be, to pay all his then existing debts.

“Nearly a year after the matters hereinbefore set forth said John C. Miller again asked this defendant, as a matter of friendship, to let him take one of these policies, so that he could secure the sum of four hundred and sixty-five dollars borrowed from Adolph Mayer; and as a matter of kindness to one for whom she had great affection, and who had much affection for her, without consideration, she consented thereto, and delivered to him said two thousand dollar policy, and he borrowed said sum of four hundred and sixty-five dollars from said Adolph Mayer, and assigned to him said policy as security therefor, and immediately thereupon executed to this defendant another absolute assignment of said policy, subject only to the lien created by said pledge to said Adolph Mayer, of said policy, and said last-mentioned assignment was at once transmitted to the insurance company, which accepted it and agreed to act upon the same.

“Said Miller in no way obligated himself to pay the premiums on said insurance.

“This defendant has demanded, claims the entire amount in the possession of said plaintiff as due to her by reason of the premises.”

The agreement of April 14, 1898, is as follows:

“CLEVELAND, April 14, 1898.

“Article of agreement by and between Mrs. Ida M. Vincent and John C. Miller of Cleveland, Ohio.

1916.]

Cuyahoga County.

"Whereas the said John C. Miller has this day borrowed from the said Mrs. Ida M. Vincent the sum of \$2,000 to bear 6% interest from date, and as collateral security has assigned the following life insurance policies to the said Mrs. Ida M. Vincent: policy 163119 in the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for \$4,000; also policies No. 74371 and 49788 in the Provident Savings & Life Insurance Society of New York. The condition of the assignment of the above policies are that if the said John C. Miller dies before the said Mrs. Ida M. Vincent, the policies shall be hers, and I hereby authorize the above companies to pay said policies in full to Mrs. Ida M. Vincent; but in the event of her, Mrs. Ida M. Vincent's death before the said John C. Miller, then said policies to revert back to the said John C. Miller upon the condition that the said John C. Miller shall pay to the estate of Ida M. Vincent the sum of two thousand dollars.

"MRS. IDA M. VINCENT.

"(Signed) JOHN C. MILLER.

"Witness: W. A. SANDERS.

"4/14/98."

The sole claim of counsel for Ida M. Vincent in the argument of this case proceeded upon the following lines: that the transaction of April 14, 1898, between Miller and Mrs. Vincent was a valid gift *inter vivos*; that by the assignments endorsed on the policies from the donor to the donee, which took effect immediately, the gift was fully executed by the delivery of said policies to Mrs. Vincent at the time of their transfer; that they were accepted at the time by her as a gift; that the gift being so perfected by delivery and acceptance, the condition annexed that should Mrs. Vincent die before Miller, then said Miller should have the right to redeem said policies by paying to her estate the sum of two thousand dollars, does not impair the validity of the gift.

In support of the last proposition that the condition annexed does not impair the validity of a gift, counsel cited numerous cases which we have examined. Most of said cases come more properly under the classification of voluntary trusts rather than of gifts; in most of them there was delivery of property to a third person to hold in trust and pay upon certain conditions to the object of the donor's bounty; in some of them the donor constituted himself trustee.

Hazerman v. Wigint, 108 Mich., 192: "The delivery of a mortgage by its owner to one person with instructions to deliver the same to another after the owner's death, is a sufficient delivery to meet the requirement of a valid gift *inter vivos*."

Bostwick v. Mahaffy, 48 Mich., 342: "Property put by a father in the hands of a third party to be delivered to his daughter upon his death, is sufficiently appropriated to belong to her after his death occurs."

Ruiz v. Dow, 113 Cal., 490: In this case a deed of real and personal property was made by a husband to his wife, and delivered to a third party for her benefit, with instructions to record it after his decease. Such delivery to a third person was held valid and sufficient to vest title in the wife to all the real and personal property described in the deed.

Greene v. Tulare, 52 N. J. Eq., 173: Deposit of bonds by Tulare with C. S. G. with instructions to deliver them "in case of my death" to Miss U. P. and her sister A. C. The ladies mentioned were held entitled to the bonds after T's death. This case also cites the case of *Moore v. Darton*, 46 De G. & S., 517, where the facts were as follows: A Miss Darton loaned to Moore (the plaintiff) £100, and he signed the following document: "Received of Miss Darton, for the use of Anna Dye, £100, to be paid her at Miss Darton's death, but the interest at four per cent. to be paid to Miss Darton." Underneath the same was written, "I approve the above. Betty Darton." This document was given to Miss Darton. The money was not paid her in her lifetime. Held by Vice-Chancellor Knight Bruce that Moore was a trustee for Anna Dye, for £100.

Wyble v. McPherson, 52 Ind., 393: Delivery by a father of certain bonds to a third person with instructions to give the bonds to certain children upon the father's death. The trust was upheld.

Blanchard v. Sheldon, 43 Vt., 512: "The defendant's testatrix in her lifetime delivered to Henry L. Sheldon \$300 and took a writing as follows: 'For value received I promise to pay Aurette Ballou three hundred dollars with annual interest, on demand, if she called for it before she deceased, if not, to be paid to

1916.]

Cuyahoga County.

Daniel M. Blanchard, by her order. (Signed) Henry L. Sheldon. Miranda Hines.'

"This paper she retained and it was with her other papers at her decease, and she had collected no part of said amount. Her intention was in taking this paper to have it drawn so that said Daniel would have whatever she should not use of the \$300. *Held*: That the \$300 became vested in said Daniel, subject to be defeated only by said Aurilla's taking some further action in regard to it; and she never having taken any, the transaction can be held as a gift *inter vivos*."

On page 514 of the opinion Judge Ross says:

"The delivery in a *donatio causa mortis* may be to a third person to hold in trust for the beneficiary, as was held in *Caldwell, Admr., v. Renfrew*, 33 Vt., 213, and *Way v. Emery*, not yet reported. So a gift *inter vivos* may be delivered to a third person to hold for the donee. To constitute a valid gift *inter vivos*, there must be both a delivery of the gift by the donor to the donee, or to some one for the donee, and an acceptance by the donee. In this case there was a delivery of the \$300 by the donor to Henry L. Sheldon, for the plaintiff. The law presumes the acceptance of a gift by the donee when it is unaccompanied by any condition to be performed by the donee. Nor do we see, upon principle, how a gift, if absolute, and delivered to a third person for the donee, but not to be delivered to the donee till the happening of some event, or if liable to be wholly defeated if a certain event occurs, is any the less a valid gift."

This case is cited rather at length, because it is one of the cases counsel relies upon as authority for his general claim that a gift may be made upon condition. It will be noticed, however, that the judge delivering the opinion calls particular attention to the fact that the delivery of the gift was to a third person, for the benefit of the donee, and that the third person or trustee held possession of the money until all conditions had been complied with.

Davis v. Ney, 125 Mass., 590: A depositor in a savings bank delivered her bank book, accompanied by an assignment of her deposits to B., upon an oral agreement that B. should draw for her what money she wanted during her lifetime, and pay the balance, if any, left at her death to her son. In pursuance of

this agreement B. paid to A. certain sums of money before her death, and the balance remaining after her death he paid to her son. *Held*: That the delivery and assignment to B. constituted a valid gift.

Kendrick v. Ray, 173 Mass., 305: "A trust which has been established in favor of B. in the proceeds of a policy of insurance on the life of C. payable 'to and for the sole and separate use and benefit of A., trustee,' is not inoperative as an attempted testamentary disposition of property by C."

The foregoing cases all have the incident of a delivery to a third person as trustee for beneficiaries named. The following cases cited by counsel for Mrs. Vincent illustrate the creation of a trust in the donor himself:

Ray v. Simmons, 11 R. I., 266: B. deposited in a savings bank certain moneys in his own name as trustee for R. B. gave the bank book to R., who returned it to B., in whose control it remained. *Held*: that the trust was completely constituted. *Held*, further, that the trust being constituted, the fact that it was voluntary, was no reason for refusing relief. To constitute a trust it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declare, either in writing or orally, that he holds it *in praesenti* in trust for another.

Scrivens v. North Easton Savings Bank, 166 Mass., 255, is like the Rhode Island case, the controversy being over a deposit by "A. in trust for B., payable in case of my death to B."

Branch v. Byrd, 15 N. C., 142: The court in this case construed an informal deed of slaves, wherein a life estate therein was renewed in the grantor and held that the intention to pass the chattels in absolute property to the donees, immediately upon the execution of the deed was explicitly declared, there was no condition in the gift; the gift was of the slaves subject to a life estate reserved.

But the case most nearly sustaining the contention of counsel for Mrs. Vincent is *Schollmier v. Schoendelen*, 78 Iowa, 426, in which the facts were as follows:

"Plaintiff's intestate had a deposit in a bank evidenced by entries in her pass book. At the end of the account she procured

1916.]

Cuyahoga County.

the cashier to write as follows: 'Pay to S. and H. all of the within deposit after my decease,' and signed her name thereto. After this she neither deposited any more money nor drew upon the deposits already made. Subsequent to the assignment, and before her death, the bank book was in the possession of S. and H., and after her death they drew the money. *Held*: 1. That the writing was in terms a full assignment of the amount shown by the book to be due at the time it was made, and not of the amount which should be due at the death of the assignor, and that if it was treated by the assignor as a completed transaction it passed a present interest in the bank account, and was not vulnerable to the objection that it was of a testamentary character, and therefore void, because not executed in the manner provided by law for such instruments. 2. The assignment in such case having been of the whole deposit, and the bank having had notice thereof, and having a rule that deposits evidenced by a bank book could be drawn out only upon the production of the book—*Held*: That if the book was delivered by the assignor to the assignees for the purpose of perfecting the assignment, it became irrevocable, and bound the bank to hold the deposit for payment to the assignees upon the death of the assignor."

In the opinion Judge Robinson, who decided the case, distinguishes it from the case of *Basket v. Hassell*, 107 U. S., 602, and as the latter case is much relied upon by counsel for the administrator in this case, it is proper to quote what Judge Robinson says on page 430 of his opinion about the *Basket* case:

"It is contended on the part of appellee that the assignment was so drawn as to be revocable, and the case of *Basket v. Hassell*, 107 U. S., 602, is cited as sustaining that position. In that case a certificate of deposit was endorsed by its owner during his last sickness as follows: 'Pay to Martin Basket, of Henderson, Kentucky, no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself. H. M. Chaney.' After making this endorsement Chaney delivered the certificate to Basket, and died. The court speaks of this transaction as being, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities, and upon the nature of the case, can not be valid as a *donatio mortis causa*, even where it is payable *in praesenti*, unless paid or accepted while the donor is alive. But there is a marked difference between the effect of the endorsement in that case and the assign-

ment in this. While in that case the endorsed certificate was delivered, yet the language of the endorsement showed clearly that it was not to take effect in case the endorser recovered. As stated by the court, the donor attached to his endorsement and delivery a condition precedent which must happen before it became a gift. In this case the conditions related to the time when the interest transferred might be enjoyed, and not to its transfer."

Now let us see if the case at bar squares itself with this Iowa case. To construe the transaction we must consider its elements.

There were three things done by Miller on April 14, 1898; first, he gave Mrs. Vincent his note for \$2,000 payable to her order five years after date, with interest at six per cent.; second, he assigned the policies to her and delivered them to her; third, he executed the agreement which is above set out in full. It is not claimed that these three things were done in the order named, but that these three things done were parts of one transaction and must be construed together. The promissory note given is an important element in the matter. It gives a commercial aspect to the affair which can not be overlooked. The assignment and delivery of the policies, taken in connection with the note, which was to become due on a day fixed, is fully explained by the statement that the policies were collateral to the note. Had there been no note given, the assignment and delivery of the policies taken in connection with the written agreement could be construed as consummating and perfecting a gift. Delivery is necessary to a valid gift and realizing this counsel for Mrs. Vincent has urged strongly that the assignment and delivery of the policies to Mrs. Vincent was for the purpose of perfecting the gift; that thereby a gift *in praesenti* was made, the condition attached as to Miller's dying first relating only to the time when the interest transferred might be enjoyed and not to its transfer.

We think the transaction should not be construed so favorably for the claim of a gift. It has been said by a judge of the Supreme Court of this state that "gifts" *inter vivos*, like gifts *causa mortis*, are watched with caution by the courts, and to support them clear and convincing evidence is required." *Flan-*

ders v. Blandy, 45 O. S., 108. The mere fact that Miller delivered the policies to Mrs. Vincent and that she had possession of them after his death, raises no presumption in favor of a gift. Nor is the testimony introduced as to the relation of the parties and the statements made by Miller at the time "clear and convincing proof" that these policies were assigned and delivered to Mrs. Vincent with the intention that thereby he completed a gift *in praesenti* to her. The intention to make a gift requires no such oral testimony to prove it; it is shown by the writing. The point in controversy is whether a gift really was made and fully consummated. All the evidence must be considered. The loan of money the giving of a note and the statement in the agreement itself that Miller "as collateral security has assigned the following life insurance policies to Mrs. Ida M. Vincent," has more convincing force with us than such statements of witnesses and we conclude that in this case there has been a failure to prove that the delivery of the policies was a delivery of a gift.

This conclusion is further warranted by the language of the agreement, bearing in mind all the time that Mrs. Vincent held Miller's note. Upon this view of the matter we adopt the contention of counsel for the administrator, which is as follows:

The meaning of the contract is that Mrs. Vincent loans \$2,000 to Miller; he gives her his note therefor and pledges the policies as collateral security for the payment of the note. Then, intending to give her the policies, Miller adds that if he dies first she shall have them. To this business transaction a gift was added, but to make the gift, Miller adds in the contract that if he dies first "the policies shall be hers." The very nature of the transaction is such that he could have no other intent than to make her a gift at the time of his death. The contract gave to Mrs. Vincent the legal title to the policies and left Miller the equity of redemption and the provision in regard to her having the policies at his death was simply to transfer to her his equity if the debt was not paid prior to his death. There was no present giving of the policies; the language of the agreement looks entirely to the future. Being a promise to give and not a gift *in praesenti*, and the promise to be fulfilled at the donor's death, it

is testamentary in character and void. *Basket v. Hassel*, 107 U. S., 602.

Having reached this conclusion with reference to the claims urged by counsel for Mrs. Vincent, it is unnecessary to consider the questions raised by the administrator as to the rights of creditors of Miller's estate. There being no valid gift to Mrs. Vincent, the fund in controversy should be paid over to the administrator, and decree may be drawn accordingly.

Judgment for defendant, Norton T. Horr, administrator.

**PAROL EVIDENCE IN EXPLANATION OF CIRCUMSTANCES
SURROUNDING A CONTRACT.**

Circuit Court of Cuyahoga County.

**THE CHEBOYGAN DREDGE & DOCK COMPANY v. L. P. & J. A.
SMITH, PARTNERS.**

Decided, February 16, 1903.

Parol Evidence—Custom Among Contractors Admissible.

In an action brought by a sub-contractor to recover an amount claimed to be due under a written contract, parol evidence of a custom among contractors by which the sub-contractor assumes the burden of providing board, conveyances, etc., for agents, engineers and surveyors of the one for whom the principal contractor is doing the work, is admissible in evidence, not to vary the written contract, but to explain the surrounding facts and circumstances under which the contract was made.

A. W. Lamson, for plaintiff in error.
Goulder, Holden & Masten, contra.

HALE, J.; WINCH, J., and MARVIN, J., concur.

Error to court of common pleas.

On the 31st day of December, 1892, the defendants entered into a contract with the United States, whereby they undertook to excavate a ship channel of a certain depth, at the mouth of the Detroit river. The contract contains specific specifications

1916.]

Cuyahoga County.

as to the work to be done and the manner in which it was to be done, and, among other things, contains the following:

“The order of the work will be determined by the United States agent in charge, and his instructions shall be observed by the contractor and his employees. When required by the U. S. agent in charge, the contractor shall, without additional compensation, furnish all necessary labor, materials and appliances for placing and replacing suitable stakes and buoys for use in making surveys for estimates, and for marking the channel. He shall also, without additional compensation, furnish the use of a tug when needed for towing the sounding rafts or scows, conveying engineers, inspectors, and other employees of the United States, and generally for all purposes connected with the inspection and supervision of the work. When required by the U. S. engineer in charge, all agents or inspectors of the United States employed on or about the work shall have meals and sleeping accommodations furnished by the contractor at a reasonable price, approved by the U. S. engineer in charge, and paid for by the United States.”

On or about the 15th of March, 1894, the defendants entered into a contract with the plaintiffs as follows:

“MEMORANDUM OF AGREEMENT Made this 15th day of March, A. D. 1894, by and between L. P. & J. A. Smith, party of the first part, and the Cheboygan Dredge & Dock Company, party of the second part.

“WITNESSETH: That the party of the second part hereby agrees to dig and remove, for the said party of the first part, three hundred and fifty thousand (350,000) cubic yards of material from what is known as Bar Point, being ‘The Eighth Section of the Ship Channel 20 and 21 feet deep, connecting waters of the Great Lakes between Chicago, Duluth & Buffalo.’ The aforesaid excavation is to be made in conformity with the contract said party of the first part have with the United States Government under date of December 31st, 1892, for the excavation and removal of material from said eighth section of said ship channel.

“Said party of the second part is to commence digging on or before the fifteenth day of May, 1894, and to continue working with at least one dredge, until the whole quantity herein specified has been excavated in accordance with the afore-mentioned contract.

“For the above work party of the first part is to pay the party of the second part at the rate of sixteen (16) cents per cubic

yard, scow measurement. Said payments to be made in accordance with the estimates furnished by the United States Government, and as soon as said party of the first part receive pay for same.

“Party of the second part hereby agrees to abstain from doing any work in Cleveland or vicinity, and further, agrees to abstain from assisting anyone else, to do any work in Cleveland or vicinity.

“IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first above written.

“L. P. & J. A. SMITH,

“THE CHEBOYGAN DREDGE AND DOCK CO.,

“By CONRAD STARKE.”

This action was prosecuted in the court of common pleas by the plaintiff in error to recover of the defendants a sum claimed to be due it under *this* last contract and for work performed thereunder.

The defendants in error denied that there was any amount due the plaintiff at the time of the commencement of the action. The *real* controversy between the parties was, whether or not the plaintiff in error should bear its proportion of the expenses provided for in the specifications above quoted, which the defendants in error agreed, in its contract with the United States, to bear. The contract between the plaintiffs and the defendant did not specifically provide upon that subject, and, on the trial, evidence was offered, and permitted to go to the jury over the objections of the plaintiff in error, tending to show a custom between contractors and sub-contractors to the effect that the sub-contractor should bear the proportion of such expenses which the work performed by the sub-contractor bore to the entire work to be done.

The bill of exceptions does not contain *all* the testimony offered on the trial. It is insisted, however, that the court erred in permitting this testimony to go to the jury: first, on the ground that no custom was pleaded by the defendant; and second, that a contract can not be varied or added to by the proof of such custom. For the purpose for which this custom was sought to be established by the evidence, it is quite clear that it was not essential that it be pleaded. It is also clear that if its

1916.]

Cuyahoga County.

purpose was simply to vary or add to the written contract, it would be incompetent; but such was not its purpose.

It was competent to bring before the jury the circumstances surrounding the parties and the conditions under which the contract was made, and to enable the jury to rightfully interpret the contract signed by the parties.

Without attempting to recite the authorities cited by the parties upon *this* proposition, most of which have been reviewed by us, we hold that this testimony for the purposes for which it was offered, was competent and that there was no error in its admission. Possibly, some of the questions submitted were somewhat objectionable, but, in that regard, we see no substantial error for which the judgment should be reversed. These results apply to *all* objections made to the testimony offered upon this subject.

There was no substantial error for which the judgment should be reversed, in the rulings of the court upon the admission or exclusion of evidence and, if this evidence was competent, the charge of the court was unobjectionable and fairly covered the issues submitted upon this point.

Whether the testimony offered and permitted to go to the jury, was sufficient to establish the custom claimed by the defendants in error with such certainty as to be available to them, is not now before the court, as the bill of exceptions does not contain the entire testimony.

There was no error in giving to the defendants in error under the issues, the opening and closing of the case on the trial.

This case has been twice tried before the court of common pleas, with the same ruling of the trial court as to the competency of this evidence; and even if it were doubtfully competent, we believe it better that this should be determined finally by the Supreme Court before further expense is made in the trial of the case.

It would seem that the whole merits of the case turn upon the proposition made, and the rights of the parties will be finally determined when the Supreme Court has settled the competency of this testimony.

The judgment of the court of common pleas is affirmed.

**AUTHORITY OF APPELLATE COURT TO MODIFY A JUDGMENT
IN THE INTEREST OF JUSTICE.**

Court of Appeals for Hamilton County.

SIMON HUBIG V. KIEWITT & FREDERICK.

Decided, March 29, 1915.

*Court of Appeals—May Modify a Judgment in the Interest of Justice—
Section 11364.*

Where justice can best be served by modifying or correcting a judgment which has been taken to an appellate court, this will be done and the judgment as so modified will be affirmed.

W. A. Rinckhoff and Philip & S. C. Roettinger, for plaintiff in error.

C. B. Matthews, George B. Goodhart and Harry T. Klein, contra.

KINKADE, J.

The defendants in error brought an action in the court of common pleas against the plaintiff in error to recover the contract price for the sale of a one-third interest in a mercantile business; also to recover damages arising, as they claimed, by reason of a loss to them sustained by the operation of the business while awaiting the incorporating of a company to take over the mercantile business with respect to which the contract of sale arose, and also to recover damages by reason of the inability of the defendants in error to secure one-third of the capital stock of the corporation so to be formed, which corporation, it was alleged, had never been formed because of the opposition thereto by the plaintiff in error here.

The plaintiff in error admitted the making of an oral contract between himself and the defendants in error, covering the purchase of a one-third interest in the mercantile business referred to, but averred that the contract was different in terms from that set forth in the petition. He further averred that after the contract had been entered into in the form as he

1916.]

Hamilton County.

claimed, that the parties had entered into another agreement, which, in effect, modified the first agreement and which contemplated a transfer of the mercantile business that was the subject-matter of the contract to still another corporation to be formed by the consolidation of certain existing companies; that he had performed all of his obligations under the modified contract, but that the defendants in error had defaulted thereon and, by reason of their default, he had been unable to secure \$5,000 of the capital stock of the last named consolidated company which was to come to him under the modified agreement, and on this account he had sustained a loss of \$7,500, his claim being that this would have been the market value of the fifty shares of the capital stock of the consolidated company which the parties had contracted he should have.

The answer denied all of the allegations of the petition as made, and presented the claim, as I have stated, in the way of a cross-petition on which the plaintiff in error prayed for judgment for \$7,500. By reply the allegations of the answer and the cross-petition were denied.

The case was tried to a jury and resulted in a verdict of one cent in favor of the defendants in error. This verdict was set aside by the trial court and a new trial granted. Upon the second trial the jury returned a verdict in favor of the defendants in error and against the plaintiff in error for \$2,375.96, upon which judgment was entered. Thus in a proceeding to reverse the judgment entered upon this last verdict, numerous alleged errors are called to our attention.

An examination of the record discloses more uncertainty and confusion with respect to amounts and the terms of the contracts between the parties than we have ever seen in any case that has been in this court. It would be impossible to put into any record evidence more contradictory than is in this record, and we think it would be difficult, even if one were to set about it purposely so to do, to state numerous amounts in a more confusing and conflicting form than is manifest in the record in this case. The figures repeatedly given by the various witnesses are representing the items of assets and liabilities are

seldom twice mentioned as the same amounts. Each side undertook to establish the terms of the contract, but we think the evidence on each side left the case in great doubt and uncertainty and in a form most difficult for consideration by any ordinary jury. Every member of this court has served as a common pleas judge and none of us recall ever having any case tried before us that was more difficult to state clearly and sufficiently to a jury than this, taking into account the various negotiations of the parties and their conduct with respect to the subject-matter of the suit before they finally disagreed and found it necessary to go into court to adjust their rights.

It is not difficult to sustain some of the claims of error urged upon our consideration by counsel for the plaintiff, but to do this by no means furnishes a satisfactory basis upon which to decide the case. The action has been twice tried with the results as stated. Several years have elapsed since the transactions took place. It is important to all that the litigation be closed without further delay, if this can be accomplished without doing injustice to any of the parties. The power of this court, and its duty as well, under circumstances such as attend this case, are clearly indicated in Section 11364, General Code. While unnecessary to supplement this direct enactment of the Legislature on the subject, we nevertheless call attention to the following general statement of the law found in 11 Enc. Plead. & Prac., 1068, which reads as follows:

“An appellate court is vested with the amplest power to suit its judgment to the exigencies of each case that comes before it, or to make its judgment effectively yield justice to the parties whose interests are involved. Accordingly, an appellate court may modify or correct a judgment brought before it.”

We have read all the evidence with great care, have examined the briefs of counsel on both sides, and have devoted to the case an unusual amount of time in its consideration. It is not practicable, within the reasonable limits of an opinion, to set forth our views in detail with respect to the various features of the case and, therefore, we have determined to state only our conclusion. It is, that, under the evidence manifest in the record,

1916.]

Hamilton County.

substantial justice will be accomplished by modifying the judgment of the court of common pleas by reducing the amount thereof to \$1,000 as of the date of the judgment there rendered, and the judgment, as thus modified, will be affirmed.

RICHARDS, J., and CHITTENDEN, J., concur.

WAIVER OF BUILDING CONTRACT GUARANTY.

Court of Appeals for Hamilton County.

LOVE, PIKET & NULSEN CO. v. ESTELLA JEROME.

Decided, March 9, 1916.

*Building Contracts—Insistence on Compliance with Specifications—
Amounts to a Waiver of Guaranty, When.*

Where a building contractor proposes to comply with his guaranty, but in order to do so must disregard an impossible provision of the specifications, the owner by insisting on compliance with the specifications waives the guaranty.

*Littleford, James, Ballard & Frost, for plaintiff in error.
Carl Lehmann and Pogue, Hoffheimer & Pogue, contra.*

SAYRE, J.

Plaintiff in error, after the contract had been made and entered into and the work commenced, discovered that the rooms could not be heated to the required temperature if the plans and specifications were complied with. So it undertook to install a heating system not in accordance with the plans and specifications. Upon discovery of this change the owner demanded to know the reason therefor, and was informed of all the facts and that the change would not be any more expensive to her. She thereupon directed the contractor to furnish the heating system called for, according to the plans and specifications, which was done.

We have no quarrel with the principle announced in *Cameron-Hawn Realty Co. v. Albany*, 207 N. Y., 377; *Lake View City v. MacRitchie*, 134 Ill., 203.

The plaintiff in error having agreed to heat the rooms to a temperature of seventy degrees F. H. during the coldest winter weather with water not over one hundred and eighty degrees was bound to do so under the contract.

If the heating apparatus had been installed, without question between the owner and contractor, in strict compliance with the specifications and it would not have heated the rooms as required, then the case would have been clearly controlled by the rule announced in the two cases above referred to. But beyond question there is in the case under consideration a different state of facts from those reported in those cases. In our case the contractor undertook to furnish the equipment which would have supplied the required temperature. It undertook to comply with its guaranty, notwithstanding the specifications. This important fact is not found in the cases referred to.

The plaintiff in error had undertaken to comply with the specifications and to furnish the required temperature—an impossible task. It could not do both. It must do one or the other. It chose to do the essential thing, to-wit: to install a heating system which would furnish the required temperature. Here the owner interfered. The same question was then before her. She could not require of the contractor an impossible thing. She must elect to require either a strict compliance with the specifications and take the chances of the heating equipment, constructed according to the specifications, being able to furnish the required temperature or to require that the heating system be installed so as to furnish the required temperature, the plans and specifications to the contrary notwithstanding. She chose the former. By such choice she waived the latter.

It has been said that the contractor, when it discovered that the contract could not be complied with, should have refused to go on with it, or have secured a modification of it. But the contractor was bound to go on with the contract and had no right

Sandusky County.

go on with it, and the only modification which it
ured was with the consent of the owner and she
ance with the specifications, which was a refusal
ract.

he court of common pleas will be reversed,
d to that court for a new trial.

CONSTRUCTION OF A BUILDING CONTRACT.

Circuit Court for Sandusky County.

**THE BELLEVUE FARMERS GRAIN COMPANY V. SIMON FRONIZER,
LESTER W. DEAN AND WILLIAM F. SCHMIDT.***

Decided, April 19, 1912.

*Building Contracts—Proof as to Any Waiver of Provisions of the Writ-
ten Contract Must be Clear and Positive—Nature of the Warranty
Given by the Contractors Construed—Damages for Failure to Com-
plete the Work Within the Appointed Time—Charge of Court.*

1. In an action for recovery of the balance of the contract price for construction of a grain elevator, under a contract which provided that no claims should be made for extra work unless such work was done in pursuance of a written order from the party for whom the work was being performed, a claim for extras having been asserted, based on a request for such extras and their being furnished under circumstances which evidenced an expectation of payment, it is error to refuse a special charge, requested before argument, to the effect that waiver of the condition of the contract as to extras can only be shown by evidence so clear and convincing as to leave no reasonable doubt with reference thereto.
2. The provision in said contract to the effect that the contractors should indemnify and same harmless those for whom the elevator

*Affirmed by the Supreme Court without opinion, *Fronizer v. Bellevue Farmers' Grain Co.*, 90 Ohio State, 446.

was being constructed from any injury or damage by reason of failure of the elevator or its equipment to be servicable for the purpose intended, constituted an express warranty, and when read in connection with other provisions of the contract is not open to the construction that, if the material used and work done were in accordance with the plans and specifications agreed upon before the work was undertaken, the contractors would be relieved from responsibility for any failure of the elevator to serve the purpose intended.

3. It is erroneous, in such a case, to direct the jury to allow no damages for failure to complete the structure within the time specified, if the defendants by acts, conduct or statements extended the time, without regard to the extent to which plaintiffs were delayed in their work by such acts, conduct or statements.

Allen Aigler and Jesse Vickery, for plaintiff.

Kinney, O'Farrell & Rimelspach and Parkhurst & Vickery, contra.

WILDMAN, J.

Error to the Court of Common Pleas of Sandusky County.

The defendants in error sued in the court of common pleas as the surviving members of a partnership which formerly included said defendants in error and one M. W. Hunt, now deceased. They asked judgment against the plaintiff in error for the balance of a contract price for the construction of a grain elevator, and for certain extras for work and materials rendered and furnished by them in connection with said structure. The elevator was constructed under a written contract and a supplement thereto, the original bearing date of June 1st and the supplement June 23d, 1909. The defendant, which was an incorporated association of farmers, filed an answer and cross-petition asserting various matters of defense and counter-claim, and asking affirmative relief in the way of damages.

The essential points of the controversy between the parties may be succinctly stated as follows:

The plaintiffs assert full performance of the contract on their part, and allege \$2,994.79 as a balance on the contract price and

1916.]

Sandusky County.

for said extras. The defendant denies the performance of the contract, alleges numerous defects of construction, and asserts by way of defense as against the claim for extras that no order for said extras in writing was ever made by the defendant, as required by the written contract in the following terms:

“All necessary expenses are provided for by the amount contracted hereby to be paid said party of the first part, so that said amount will cover the entire cost to said party of the second part. No claims for extra work shall be made unless the same be done in pursuance of a written order from said party of the second part and given to said party of the first part prior to the doing of said extra work, or the furnishing of extra materials.”

The principal claims asserted by the defendant by way of counter-claim are upon an alleged warranty, embodied in the written contract, and a stipulation that the entire work of construction should be performed between the date of the contract and August 31, 1909. As stated in the plaintiff's petition, the building was not in fact completed and ready for operation before December 6th of that year. The contract contained a provision that for any delay not due to certain specific causes beyond the control of the contractors, after the stipulated date of completion, the defendant company should be entitled to \$10 for each day during such delay as liquidated damages. The total amount of damages claimed by the defendant was \$4,890, for which the defendant asked judgment.

The case was tried to a jury and resulted in a verdict for the plaintiff below in the sum of \$2,725.95. The record brought up to us is a very long one, embodying about 1,000 pages of evidence in the bill of exceptions, and numerous claims of error are made. It is claimed that the verdict is not sustained by this evidence, but our attention has been called to the fact that although the certificate of the trial judge asserts that the bill contains all the evidence, it lacks a written exhibit which appears to have been offered and received, and for that reason we are not attempting to pass upon the weight of the evidence. It does not appear that this exhibit is not material to such inquiry.

Among the numerous claims of error are a few which seem to demand especial attention by reason of their importance, and the fact that especial emphasis has been placed upon them in argument. I have already referred to the requirement of the contract as to written orders for extras. The plaintiff contends that although no written orders were given, these extras were requested by the defendant and furnished under such circumstances as to evidence an expectation of payment. In view of the evidence bearing upon this point, at its close and before argument, the defendant among other requested instructions asked the court to give to the jury instruction No. 10, which I read:

“You are instructed that in order for the plaintiff to recover for any extras save and excepting those expressly admitted by the defendant in open court, the plaintiffs must show that the condition in the contract providing that ‘No claims for extra work shall be made unless the same be done in pursuance of a written order from said party of the second part and given to said party of the first part prior to the doing of said extra work, or the furnishing of extra materials,’ has been waived by the defendant and the plaintiffs must prove the waiver of the condition by such clear and convincing evidence as to leave no reasonable doubt about the waiver.”

This instruction the court refused to give. It is our view that the defendant was clearly entitled to this instruction before argument, and that it should have been given, pursuant to *Ashley v. Henahan*, 56 Ohio St., 560, paragraph 5 of the syllabus. The refusal of the court to give it was reversible error, and was not cured by the giving of a portion of it, in substance, in the general charge. That the action of the court may have resulted in prejudice is indicated by an express special finding of the jury that a part of their verdict to the amount of \$316.91 was for extras in excess of such as were admitted by the defendant.

The written contract sued upon contained the following language:

“Said party of the first part shall indemnify and save harmless said party of the second part from all injury and damage

1916.]

Sandusky County.

by reason of any failure of said steel elevator or equipment thereof to be serviceable for the purposes intended, to-wit, the economical receiving, handling and shipping of grain."

This paragraph, with certain other expressions in the contract, and an indemnity bond executed in connection with it, constituted, under our construction, an express warranty, and as such was not affected by the fact that the work was to be done and materials were to be furnished by the contractors pursuant to certain plans and specifications agreed upon by the parties. The defendant contends that it is an association of farmers, unskilled in the construction of such an elevator, and that they made the contract in reliance upon assurances of the contractors that the structure, when completed pursuant to said plans and specifications, would be serviceable to the extent and in the way expressed in the contract. Incidental to this matter are certain claimed errors in the refusal of the court to permit oral evidence of conferences before and after the execution of the contract, between a director of the defendant company and some representative of the plaintiffs. We incline to the view that the holding of the court in excluding this evidence was correct, for the reason that the contract spoke for itself, and it needed no reinforcement of this character. The parties were presumed to enter into the contract in reliance upon its terms. The court, however, throughout the case seems to have adopted the contention of plaintiff's counsel, holding that if the plaintiffs constructed the building pursuant to the plans and specifications and the other express terms of the contract, it was of no consequence whether the elevator proved serviceable for the purposes intended and expressed. This is especially illustrated in the giving of plaintiff's requested instruction No. 3, and in various expressions in the general charge. Without quoting this instruction, or these expressions, it is sufficient to say that we think that the court fell into an error in this regard. Before entirely leaving this subject I should mention that the written contract between the parties contained a provision as follows:

“The whole of the work provided for in these specifications must be done to the full satisfaction of, and final acceptance by said party of the second part.”

It is essential that this stipulation should not be overlooked in any consideration of the questions involving a performance on the one side and acceptance on the other. Little, if any, force seems to have been given to this important and not unfamiliar clause in building contracts in the court's definition of the rights and obligations of the parties. Indeed, as shown on page 1008 of the bill of exceptions, the judge said to the jury that even if it is a fact that the company never did accept the elevator, that fact—

“will not defeat the right of the plaintiffs to recover, if you further find that the plaintiff's firm completed said work, in substantial compliance with the contract in question in this case; if it did, it is entitled to recover the contract price.”

In other parts of the charge this stipulation in the contract seems to have been overlooked. Before argument, an instruction, No. 5, asked by the defendant, which bears on this matter, was refused. This instruction reads as follows:

“The contract between the parties to this action provides that ‘the whole of the work provided for in these specifications must be done to the full satisfaction of, and final acceptance by said party of the second part,’ and before the plaintiffs can recover in this action they must show that they have completed the construction of this elevator and the equipment substantially in accordance with the plans and specifications, unless they show that said building was accepted by said defendant.”

We think that it embodied in substance a correct proposition and should have been given.

Among the instructions asked by the plaintiff and given before argument is No. 5, as follows:

“I say to you as a matter of law, that the defendant had the right to extend the time for the performance of the contract, and waive the requirements therein as to time, and that the same need not have been in writing; and should you find from the

1916.]

Sandusky County.

evidence that the defendant did extend the time for the performance of said contract, either by acts, conduct or direct statement, made to the plaintiffs, or by the ordering and directing of extra work to be done by the plaintiffs or their sub-contractor, not provided for in the contract, then defendant can not recover anything by way of damages for a failure to have said contract completed within the time specified in said contract.”

This instruction was clearly erroneous, as directing the jury to allow no damages for failure to build the structure within the time specified in the contract, if the defendant by acts, conduct or statement extended the time at all, without regard to the extent to which the plaintiffs were delayed in their work by such acts, conduct or statements.

Instruction No. 3 asked by the defendant was one to which we think the defendant was entitled, and that the court erred in refusing it. The same is true as to instruction No. 7, which called attention to the express warranty in the written contract.

We might dwell further upon the general charge of the court, which in some respects seems to us to be possibly misleading, but the errors to which attention has been expressly called seem to us so vital as to require a reversal of the judgment of the trial court; and we are not disposed to enter into unnecessary criticism of a charge, most of the features of which are entirely in accordance with the law. I will say here that the case was sufficiently complicated and the questions sufficiently difficult to make the framing of the instructions equally so.

Upon another trial the corrections of any errors of minor character, and dependent, to some extent, upon those to which attention has been called, will readily be made without special mention of them in this opinion. We might suggest the query whether before the re-trial there should not be some remodelling of the pleadings to avoid further possible error, in view of the fact that there is no express averment in the petition or reply of waivers of the requirements of the contract as to extras and delay in construction. The petition alleges performance of the contract—not waiver or modification of its obligations; and it fails to allege any express contract for extras, or promise of payment therefor.

The judgment of the court of common pleas will be reversed and the cause remanded for a new trial, and further proceedings according to law.

KINKADE, J., and RICHARDS, J., concur.

**AS TO LIABILITY OF PLEDGEE FOR SELLING ARTICLE FOR
LESS THAN ITS VALUE.**

Circuit Court of Cuyahoga County.

THE MERCHANTS' BANKING & STORAGE COMPANY v.
SARAH M. RYDER.

Decided, December 22, 1900.

*Pledges—Duty of Pledgee to Obtain Highest Price of Pledged Articles
at Private Sale.*

1. Where the pledgee of personal property sells the pledged articles at private sale, he acts as agent of the pledgor in making the sale, and it is his duty to exhibit the articles in such a manner as to attract buyers and use all other reasonable methods of obtaining as nearly as possible what the articles are reasonably worth.
2. Where the pledgee of personal property sells it at private sale for a sum much less than the actual value of the property, the discrepancy in price may be so great as to establish want of care and neglect of duty on his part and make him liable in damages for the difference between the selling price and the actual value.

M. H. Solloway, for plaintiff in error.

Foster & Foster, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

The case of the Merchants' Banking & Storage Company against Sarah M. Ryder comes into this court on error from the court of common pleas.

The defendant in error, Sarah M. Ryder, pawned some diamond ear-rings with the plaintiff in error, the Merchants' Banking & Storage Company, and obtained upon them \$147, for which she gave a note of \$150.

A card was given her at the time, which she accepted and retained, and on which she waived notice of the sale and waived publication of sale, and authorized a private sale. The obligation became due and was not paid; the interest was not kept up; and, after the statutory period, a private sale was made. The

1916.]

Cuyahoga County.

diamonds were sold for \$195, and the pledgor brought this action to obtain the full value of the diamonds, less what she owed the bank.

Many exceptions were taken to the evidence upon the trial of the case, and exceptions were taken because the court refused to charge as requested by the storage company. These exceptions to the evidence, and the exceptions to the court's refusal to charge, were largely due to the fact that the case was tried on a different theory from that presented by the petition; that is, the attorney for the storage company took it that this was for a conversion of the property and as though Mrs. Ryder was trying to reclaim the property; but that was not the action.

It was recognized as a fact all the way through, that the storage company had proceeded as it was authorized to do, in proceeding without notice to her to sell, and proceeding to sell at private sale.

The only question involved in the case was, whether the storage company, because of the manner of conducting the sale, was so negligent and careless in the sale of this property, that it obtained much less than its real value, and that the evidence of that discrepancy would, in and of itself, show carelessness and negligence.

The title to pledged property remains in the pledgor; the pledgee gets a lien upon the property. When the pledgee makes a conversion of the property, if that is unlawful the pledgor may treat it as no disposition of the property and may proceed against the pledgee. That is one remedy that the pledgor may have; or the pledgor may proceed simply for damages for non-performance of the duty owed to the pledgor by the pledgee.

Complaint is made in this case that the pledgee of the property made no reasonable effort to obtain purchasers for this property when it was for sale; that it was kept in a desk, in a box, and was exhibited to no one who was there for the purpose of making purchases except those who might inquire for property of that kind.

The authorities show clearly that the pledgee can not excuse himself in making a sale of this character unless he uses that diligence that persons who generally sell that class of property use. If it becomes necessary to advertise to call the attention of

persons who purchase that class of property, notifying them that the property is for sale—all these things are what merchants do; and merchants always expose that class of property in show-cases; they do not hide it away as a rule; at least, they keep some part of it where it can be seen, and where persons looking for purchases of that sort, may see it. None of these things were done on the part of the company.

Now, in the sale of pledged property, the pledgor still remains the owner, and the pledgee becomes an agent to sell, and the authorities state his duty pretty clearly in saying that his duty is that of a prudent executor in making a disposition of the property in his hands as trustee. The duty of the agent is measured by many authorities by that rule, and, if he falls short of that, he has not met his obligation to the bailor.

The evidence in this case shows that this property was sold for \$190; and while experts as to the value of diamonds, some called by one side and some by the other, testified in this case, there was no expert called who did not place the value of this property at considerably more than was obtained for it; even the very lowest by either side places it considerably higher.

The only question in the case is, whether it was sold so much below the market value of the property that it would warrant the court in saying that there was negligence on the part of the agent or pledgee. That is really the only question there is in the case. Some authorities have said that that discrepancy must be so great as to show an intentional injury. That was, many years ago, the rule of some of the courts. I do not find that it is the rule of the present day at all. But, as I have said, it is put on the ground of agency; and, if the testimony shows that the agent was careless and negligent in obtaining what he might have had for the property, that is, what the market would have warranted for such property, then he is liable for such carelessness and negligence.

We have figured this matter over, taking the figures of the experts, and have examined it carefully, and we can not say that the jury were far out of the way; the evidence would warrant them in giving the verdict they did, and we see no other way, under the rule in such matters, than to affirm this judgment.

1916.]

Allen County.

NO APPEAL FROM AN AWARD BY THE INDUSTRIAL COMMISSION.

Court of Appeals for Allen County.

STATE LIABILITY BOARD OF AWARDS ET AL V. NEWTON SNYDER.*

Decided, November 4, 1915.

*Workmen's Compensation Law—Act of May 31, 1911 (102 O. L., 524)—
Rights of Appeal—Section 36 Construed.*

Under the act of May 31, 1911 (102 O. L., 524), when an award has been made upon the application of an injured employee, appeal does not lie from the board's action in the matter of determining the amount or amounts of such award.

*Engene Carlin and J. J. Weadock, for plaintiffs in error.**T. R. Hamilton, contra.***CROW, J.**

Defendant in error, who was plaintiff below, was injured in the course of his employment while in the service of the Lima Locomotive Corporation, which had complied with the laws of this state relative to workmen's compensation insurance.

The accident occurred January 18, 1913. Subsequently he made application to the State Liability Board of Awards, which took cognizance of the same, and on May 14, 1914, by warrant on the state treasurer, disbursed the sum of \$181.71 to the claimant. On the same date, by a like warrant, the amount of \$18 was paid to the attending physician, whose verified report was filed by plaintiff in support of his said application. On May 26, 1914, by a warrant similar to the above, the sum of \$19 was paid to claimant. This warrant appears to have been issued to cover hospital charges incident to plaintiff's injuries. No further payment was made to plaintiff below nor on account of the accident to him.

On September 25, 1913, the claimant caused a notice of appeal to be served on the prosecuting attorney of Allen county,

*Affirmed with opinion, *State Liability Board of Awards v. Snyder*,
94 Ohio State.

Ohio (the county wherein his injuries were incurred), from the action of the board, and on October 24, 1913, filed his petition in the court of common pleas of said county, against said board and the industrial commission of Ohio.

In said notice of appeal and petition, the claimant set forth the nature of his employment, the compliance by said employer with the provisions of the workmen's compensation law of Ohio, the date he sustained said injuries, the nature of the latter, the circumstances attending the accident to him, the fact that he had made application to the defendant State Liability Board of Awards, the cognizance of said application by said board, the election of plaintiff to accept under the provisions of said laws, the incapacity of plaintiff from following his usual vocation, and that in the month of August, 1913, said board absolutely rejected his claim without right or authority and refused to make payments in compliance with the laws above referred to.

The case was submitted to a jury, who returned a verdict in favor of plaintiff below. Judgment was rendered on the verdict, and by this proceeding in error it is sought to reverse said judgment.

The bill of exceptions does not contain the record of proceedings of the board in the matter of plaintiff's claim.

It does appear, however, from a letter dated June 21, 1913, in answer to one from claimant, dated the 19th of that month, that the chief clerk of the board informed claimant that his claim would come up for further consideration by the board within the next few days and that he would be promptly advised as to the further disposition of it. The contents of said letter from the claimant are not disclosed.

And it further appears, by a letter dated August 26, 1913, from the chief medical examiner of the State Liability Board of Awards, to the attorney for the claimant, in answer to a letter from the latter that on August 11, 1913, "The board acted on the case, August 11, and considered that no further compensation was due," and that "the case was closed."

Between August 26, 1913, and the commencement of plaintiff's said action he made no further application to the board.

1916.]

Allen County.

As already stated, the record under review does not show the proceedings of the board, excepting as they may be gathered from the evidence of the plaintiff, the warrants (which were paid to the payees), the letters above referred to, and the evidence of the chief medical examiner.

While the date does not appear with entire clearness, the fact is that subsequently to the receipt of the warrant by plaintiff for the \$181.71, the chief medical examiner made a personal examination of the claimant at his home in Lima, Ohio. He testified that he was not requested to make the examination but did so of his own volition under a rule of the board requiring such action in "difficult cases." His evidence further shows that the payments by the two warrants above mentioned, to the claimant, were based upon plaintiff's application, the verified report of his attending physician, and the report of the board's local physician. And from the testimony of the witness it appears that upon his report, the board, on August 11, 1913, took the action set forth in his letter of August 26, 1913.

The controlling question in the case depends on the construction of Section 36 of the act found at page 524 of Volume 102 Ohio Laws, now Section 1465-75, General Code, and related sections.

Plaintiff in error contends that because the claimant participated in the insurance fund, the court below was without jurisdiction to entertain plaintiff's appeal and petition.

Defendant in error insists that there was no "final action" on the claim until the step taken on August 11, 1913, which was the denial of the right of the claimant to further participate.

Viewing the language of Section 36 alone, the position of defendant in error does not seem to be without foundation. The pertinent provisions of that section are as follows:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

"Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the

ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right." * * *

But in the interpretation of the meaning of the words "final action," resort must be had to the context of the law, the dominant purposes of which are to lodge in the board the power of accumulation of the fund, and its distribution (within the limits prescribed) among those for whose benefit it is created.

Within the scope of these purposes it is the obvious intent of the legislation to make the board supreme, but there is no such manifest purpose, so far as concerns the determination of the status of eligibility of one who seeks to become a beneficiary.

The act would be lacking in vitality if the arbitrary power were sought to be conferred upon the board, of determining who might or might not be proper recipients of the relief provided by the legislation. A provision must of necessity have been made whereunder a person amenable (as plaintiff below was) to the law, should have "his day in court," on the question of his right to participate in a fund to which alone he would be compelled to look for redress.

Section 33 of the act, now Section 1465-72, General Code, declares the power and jurisdiction of the board over each case to be continuing, and that it may from time to time make such modification of, or change in, its former findings or orders with respect thereto, as, in its opinion, may be justified.

In the light of this section and of the general language of the remainder of the act, what can properly be said to have been in legislative contemplation, by the employment of the words "final action" in Section 36, in its relation to the subject of the section, namely, the right of participation at all in the fund?

The construction urged by defendant in error would confine the term "final action" to the latest step taken by the board, rather than to the jurisdictional determination by it.

Section 1465-75, by its own unambiguous language, declares in the board full power and authority to hear and determine all questions *within its jurisdiction*, and makes its decision final thereon.

1916.]

Allen County.

Of course, the jurisdiction of the board in any case depends on the eligibility of the claimant to participate to *any extent* in the fund.

In view of the purpose sought to be accomplished by the act, the means and methods of such accomplishment, and of the language of all the remainder of the act, the conclusion seems inevitable that the words "final action" relate solely to the matter of determination of the *right* to share in the accumulation resulting from the collective premiums.

From the denial of such right, the claimant may appeal, and upon proceedings thereunder, that question shall be adjudicated by the law of the land, and all other matters, properly in controversy, be therein disposed of.

Consequently, when a claimant invokes the provisions of the legislation, and after determination in his favor fixing his status of eligibility to participate, the amount of allowance made by the board can not be reviewed by way of appeal to the courts.

The power and jurisdiction of the industrial commission still exist over the subject of claimant's injuries, but the question of the *extent* of the relief awarded by it or its predecessor has not, by any provision of existing statutes, been made reviewable by judicial proceeding.

KINDER, J., concurs; ANSBERRY, J., not sitting.

SERVICE UPON THE STATE IN PROSECUTIONS FOR MISDEMEANORS.

Court of Appeals for Hamilton County.

SAMUEL STRYK V. STATE OF OHIO.

Decided, February 20, 1915.

Criminal Law—Proceedings in Error in Misdemeanor Cases—Service on the Attorney for the Prosecuting Witness Insufficient to Bring the State Into Court.

In the prosecution of error proceedings in an action by a wife against her husband for failure to provide for their minor child, service of summons in error upon the attorney representing the wife or waiver of service by him does not give the reviewing court jurisdiction, and the state can be brought into court only by service on or waiver of service by the prosecuting attorney or some one duly authorized by him to act in that behalf.

Harry Hess, for plaintiff in error.

Jos. L. Meyer, contra.

GORMAN, J.

This is a proceeding in error to reverse the judgment of the court of common pleas, which affirmed a judgment of the municipal court of Cincinnati in the above entitled cause.

Prosecution was commenced in the municipal court of Cincinnati against the plaintiff in error Samuel Stryk by his wife charging him with failure to provide under the statute. The affidavit charging the plaintiff in error with the violation of the statute was filed in the municipal court on the 3d of August, 1914, and therein it charged the said Stryk with the violation of Section 12970, General Code, which in substance provides that whoever having the control of or being the parent or guardian of a child under the age of sixteen years abandons such child * * * or negligently fails to furnish it necessary and proper clothing and shelter, shall be fined not less than ten dollars or more than two hundred dollars or imprisoned not more than six

1916.]

Hamilton County.

months, or both. Therefore it will be seen that the offense charged was misdemeanor.

Upon the trial in the municipal court the plaintiff in error, Stryk, was found guilty and ordered to pay to the Ohio Humane Society the sum of eight dollars per week for the proper support of his minor child, Ester Stryk. Motion for a new trial was made, and overruled, and a bill of exceptions was prepared, filed and signed in due form by Judge Bell of the municipal court. A petition in error was thereupon prepared by counsel for plaintiff in error, the caption of which was "The Court of Appeals, Hamilton County. Samuel Stryk, Plaintiff in Error, versus State of Ohio, Defendant in Error." The petition in error was signed by Mr. Hess, counsel for plaintiff in error, and duly verified by plaintiff in error, Samuel Stryk.

It appears that before the petition in error was filed with the clerk of the court of appeals a waiver was signed, upon the back of the petition, as follows: "The defendant in error by the prosecuting attorney, Joseph L. Meyer, hereby waives the issue and service of summons in error in the above entitled action, and enters appearance therein. State of Ohio, by Joseph L. Meyer, Attorney." When the petition in error was brought to the court house by counsel for plaintiff in error, he learned that error would not lie from the municipal court to the court of appeals, and he thereupon changed the caption of his petition in error by striking out "Court of Appeals" and substituting therefor "Common Pleas Court of Hamilton County, Ohio" and filed the petition in error together with the transcript of the docket and journal entries and original papers of the municipal court, with the clerk of the court of common pleas, leave having been given to file petition in error by one of the judges of the court of common pleas. There was also filed with the papers an acknowledgment by Joseph L. Meyer as attorney for the state of Ohio, of the notice of the filing of a petition in error, but this notice was also captioned "Court of Appeals" and before filing it with the clerk was changed to "Common Pleas Court of Hamilton County" and the record discloses that Mr. Meyer was not apprised of the change in the caption of the petition in error or the acknowledgment of the notice of filing petition in error.

The case came on to be heard in the court of common pleas, and various motions were made to dismiss the error proceeding on the ground that the state of Ohio, the defendant in error, was not properly in court, not served with summons in error or a waiver. The court of common pleas overruled all the preliminary motions, and upon hearing affirmed the judgment of the municipal court, and error is now prosecuted from the court of common pleas to this court seeking to reverse that judgment.

In this court there was filed with the petition in error a transcript of the docket and journal entries of the common pleas court, together with all the original papers and transcript of the docket and journal entries and the bill of exceptions from the municipal court.

Upon the filing of the petition in error in this court on December 23, summons in error was issued directed to the sheriff of Hamilton county, commanding him to notify the state of Ohio that the plaintiff in error had filed a petition in error in this court. This summons in error was served upon Joseph L. Meyer as attorney for the state of Ohio. When the case was argued in this court by counsel for plaintiff in error and Joseph L. Meyer, suggestion was made to the court that there was no jurisdiction to hear and determine this case because the state of Ohio had not been served with summons in error, nor was there a waiver of service on the part of the state of Ohio.

The Legislature, in February, 1914 (104 O. L., 187), among other things amended the act creating the municipal court of the city of Cincinnati so as to confer jurisdiction on the common pleas court to hear and determine proceedings in error prosecuted from the municipal court, whereas theretofore the original act provided for the prosecution of error to the Court of Appeals of Hamilton County. The act creating the municipal court of the city of Cincinnati together with the amendments thereto, provides the method of prosecuting error. Section 26 (104 O. L., 187) among other things provides that proceedings in error may be taken to the Court of Common Pleas of Hamilton County from a final judgment or order of the municipal court of Cincinnati in the same manner and under the same conditions as provided by law for proceedings in error from the court of

1916.]

Hamilton County.

common pleas to the Court of Appeals of Hamilton County.
* * * The review of all cases other than civil actions and proceedings shall be had in the manner provided for review of actions and proceedings in which a judgment for more than three hundred dollars has been granted." By the provisions of the sixth section of the original act creating said court (103 O. L., 280), a municipal court is given jurisdiction in criminal matters and prosecution for misdemeanors or violation of ordinances as heretofore had by the police court of Cincinnati. By Section 8 of the act, page 281 of 103 Ohio Laws, it is provided that municipal court shall have jurisdiction of all misdemeanors and of all violations of city ordinances of which police courts in municipalities now have or may hereafter be given jurisdiction. And again, by the provisions of Section 13 of said act, page 283, it is provided that in all criminal cases and proceedings the practice and procedure and mode of bringing and conducting prosecutions for offenses, and the powers of the court in relation thereto, shall be the same as those which are now, or may hereafter be, possessed by police courts in municipalities unless otherwise provided herein.

It is therefore clear that the municipal court of Cincinnati had jurisdiction of this prosecution and that the methods of procedure should have been the same therein as theretofore had in the police court of the city of Cincinnati.

By the provisions of Sections 4306 and 4307, General Code, the city solicitor shall be the prosecuting attorney of the police court, and shall prosecute all cases brought before that court, and as far as they are applicable thereto, perform the same duties as required by the prosecuting attorney of the county. He may designate one of his assistants to act as prosecuting attorney of the police court.

It would therefore appear that ample provision has been made for the prosecution of misdemeanors and crimes in the municipal court of the city of Cincinnati by virtue of the foregoing provisions referred to, which in substance provide that the procedure, methods and practice had in the police court shall be the same in the municipal court; and it was therefore the duty of the prosecuting attorney of the police court or the solicitor or

assistant solicitor of the city of Cincinnati to attend to this prosecution. While there might be no objection to the attorney for the prosecuting witness appearing and assisting, nevertheless the law does not recognize such an attorney as representing the state. There was no power or authority in Joseph L. Meyer to appear on behalf of the state, or to represent the state of Ohio either in the municipal court or the court of common pleas, nor yet in this court, as will be seen by reference to the statute.

The court is therefore of the opinion that the state of Ohio was not before the court of common pleas in this proceeding in error because of the absence of the summons in error, and because of the failure of the prosecuting attorney either of the police court or of Hamilton county to waive the issuance and service of summons in error.

In any event, the waiver of Mr. Meyer of the issuance of the summons in error to the court of appeals would not be a waiver of the issuance of the service of summons in error without his consent in the common pleas court, if the caption had been changed without his knowledge and consent, as appears to have been done. By the provisions of Section 13751, General Code, amended in 103 O. L., 434, in a criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court.

Section 13753, General Code, provides that a proceeding to review such a judgment shall be by petition in error, to which shall be attached such transcript and any original papers received by the clerk. This same method of proceedings in error is to be pursued when error is prosecuted in a criminal case from the court of common pleas to the court of appeals.

Section 13754, General Code, provides that when such petition in error and precipe are filed in a criminal case (whether in the common pleas court or the court of appeals) a summons in error returnable in ten days shall be issued by the clerk thereof unless a judge thereof prescribe another day for such return. Such summons shall be directed to the sheriff of the county in

1916.]

Hamilton County.

which the judgment was rendered, and it shall contain such description of the judgment as to identify it, recite the fact that a petition in error has been filed, command the sheriff to notify the prosecuting attorney of the time it will be for hearing, and if original papers are required, command the sheriff to notify the officer in whose possession they are, to forward them to such clerk, etc.

Now in the case at bar there was no summons in error issued out of the common pleas court and no service made upon either the prosecuting attorney of the county, or, if we assume that the prosecuting attorney of the municipal court could exercise the functions of the prosecuting attorney of the county, no service was had upon him. The waiver of Joseph L. Meyer on behalf of the state of Ohio was entirely unauthorized and was not sufficient to bring the state of Ohio within the jurisdiction of the court of common pleas; so that in the opinion of the court, the common pleas court had no jurisdiction of the state of Ohio, and could not therefore proceed to hear and determine proceedings in error prosecuted from the municipal court of Cincinnati.

The same situation was presented to this court. While summons in error was issued out of this court on the petition in error, it did not require the sheriff to notify the prosecuting attorney of Hamilton county, as provided by Section 13754, General Code; and in the opinion of this court no other person was authorized to act on behalf of the state of Ohio. The prosecuting attorney might under certain circumstances designate somebody to act on behalf of the state. Nothing of that kind was done in this case, nor is it claimed that it was done. Joseph L. Meyer, so far as the record shows, acted merely as counsel for the prosecuting witness, Dora Stryk.

It was held by the Supreme Court in the case of *Nichols v. State*, 71 O. S., 335, that a prosecuting attorney may effectively waive the issuance and service of summons in error, and enter the appearance of the state by a proper endorsement for that purpose upon a petition in error filed for the reversal of a conviction for crime or misdemeanor.

Inferentially, therefore, it must be presumed that no other person, in the absence of authority in the statute, had the power

or the authority to waive the issuance and service of summons in error, nor could any other person be served with summons in error. The service of the summons in error issued out of this court upon Joseph L. Meyer had no more effect in bringing the state of Ohio into this court than if the summons in error had been served upon any other stranger to the record.

In civil actions it would be held necessary to issue summons in error in order to bring the proper party before the court, unless there was a waiver. *R. R. Co. v. Anbach*, 55 O. S., 553; *Andress v. Greenfelter*, 9 C.C.(N.S.), 446; *Robinson v. Orr*, 16 O. S., 284.

We hold that the same rule should apply in criminal cases. It would appear, therefore, that this court has no jurisdiction of the State of Ohio and can not proceed to hear and determine the questions of error raised, if any, which were committed either in the common pleas court or the municipal court of Cincinnati, and the only action that can be taken in this case at this time is to strike the petition in error from the files.

The court can not say whether or not there was error in the proceedings in the municipal court, but is strongly of the opinion that the court of common pleas acquired no jurisdiction in error for the same reason that this court has no jurisdiction at this time.

The judgment of the court is that the petition in error and the original papers and bill of exceptions shall be stricken from the files, and this the court does upon its own motion, for as we understand the law it is the duty of a court whenever it appears, at any stage of the proceedings, that it has no jurisdiction either of the person or of the subject matter, to proceed no further with the hearing of the cause or proceeding, but to strike the pleadings and papers from the files, and this it may do *sua sponte*.

The entry should be made accordingly.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

1916.]

Stark County.

**INTERPRETATION OF THE STATUTE RELATING TO
QUALIFIED ENDORSEMENTS.**

Court of Appeals for Stark County.

JOHN BEDERMAN ET AL V. THE OTISVILLE STATE BANK.

Decided, January Term, 1916.

Promissory Notes—Mistake as to Character of Instrument Signed Not a Defense Against an Innocent Holder—Rule as to Liability to a Purchaser for Value Before Maturity—Not Changed by the Statute Having Reference to Qualified Endorsements.

The qualified endorsement of a note "without recourse" simply precludes the endorsee from holding the endorser liable to him in the event the maker falls to pay the note, and the statute having reference to qualified endorsements in no way changes the well established principle of law that the purchaser of commercial paper for value before due, in the absence of fraud or knowledge of any infirmity in the instrument or defect in the title thereto, deprives the maker of any defense.

Welty & Burt, for plaintiffs in error.

McCarty & McClintock, contra.

HOUCK, J.

This is an error proceeding and comes into this court from the Common Pleas Court of Stark County.

In the court below judgment was rendered in favor of defendant in error, the plaintiff below, in the sum of \$896, with interest on \$95 thereof from the 26th day of June, 1912, to May 4th, 1914, making a total of \$906.75. This judgment was based upon the verdict of a jury in that sum. The action below was based upon a promissory note in the sum of \$800, dated June 22d, 1911, and payable September 1st, 1912, and for interest on two other certain notes of even date therewith for like amount, payable September 1st, 1913, and September 1st, 1914, respectively. The three notes in question were payable to Caulkins & Augsburg, or order, and were signed by all of the plaintiffs in error, the defendants below.

The plaintiff below, defendant in error, claimed in its petition to be an innocent holder in due course, and as such exempt from any defenses which might have been set up against the original payees, alleging that it was the owner and holder of said notes, purchased before due and for a good and valuable consideration paid therefor. The defendants below, plaintiffs in error, in their answer denied that the bank was a holder in due course, and alleged fraud and want of consideration in the making of said notes. A reply was filed by the plaintiffs below denying all of the material allegations in the answer of the defendants.

A petition in error is filed in this court seeking a reversal of the judgment below. The plaintiffs in error seek a reversal, first, because they claim that one of the makers of the note, Harry Richey, was induced by the agent of the original payees of the note to sign the same by reason of the fraudulent representations or statements made to him by said agent, and upon which statements he relied. It is claimed that the defendant Richey at the time he signed said note was induced to sign the same by statements made by the agent of the original payees; that said agent stated to him that the paper that he was about to sign, and which afterward proved to be the note in question, was a certificate of stock, and that he was unable to read the same by not having his spectacles with him, and that he relied upon the statements of said agent in the premises, and thereby was induced to sign the note in question.

Assuming that all of these statements are true, are they sufficient in law to release said Richey and his co-makers from the payment of this note? We think that the facts here disclosed have fully been determined in the case of *DeCamp v. Hamma*, 29 O. S., 472:

“Where one voluntarily signs a promissory note, supposing it to be an obligation of a different character but has full means of information in the premises and neglects to avail himself hereof, relying on the representations of another, he can not set up such ignorance and mistake as a defense against an innocent holder for value before maturity. If, however, his signature was procured without negligence on his part, and through artifice or fraudulent representations, the rule is different, and the

1916.]

Stark County.

jury should be left under appropriate instructions to determine these facts.”

Plaintiffs in error contend that the court below erred in giving certain requests before argument which were presented on behalf of the plaintiff below, the defendant in error. We have examined these requests, and we find that they are correct propositions of law applicable to the particular facts in the instant case, and therefore find no error in this particular.

Plaintiffs in error earnestly contend that the trial court committed prejudicial error in its refusal to charge the jury before argument as follows:

“If you find from the evidence that as between Caulkins & Augsbury and the defendants herein that said notes were wholly without consideration, and you find that the notes were transferred by said Caulkins & Augsbury to the plaintiff without recourse, then I will say to you that such instrument was a mere assignment of such interest as Caulkins & Augsbury had in and to said note or notes, and that if said notes were procured by said Caulkins & Augsbury from the several defendants wholly without consideration, then I will say to you as a matter of law you verdict should be for the defendants.”

Plaintiff in error takes the position that this qualified endorsement of the payees made them mere assignors of the title to the note, and hence made the defendant in error, the Otisville State Bank, a mere assignee of such title as was in the payees. This brings the real question involved in this case squarely before us for consideration and determination as to the respective rights of the parties to this action.

It will be observed that in this case the note or notes in question were indorsed before due to the defendant in error, the plaintiff below, and that the indorsement was a qualified one, being “without recourse.” It is urged by counsel for plaintiffs in error that the indorsement in the case at bar is clearly a qualified indorsement within the meaning of Section 8143 of the General Code, and by reason of this fact the defendants below, plaintiffs in error, are entitled to all of the legal defenses against such indorsee that they would have had or might have had

against the original payees, notwithstanding the fact that the indorsement was made before the note became due. In order to solve this question it is necessary to determine the meaning of and the legal force and effect of a qualified indorsement as provided in Section 8143 of the General Code, which is as follows:

“A qualified indorsement constitutes the indorsee a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words ‘without recourse,’ or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.”

If the contention of counsel for plaintiffs in error is sound, then the theory and rule as to the rights heretofore existing in favor of an innocent purchaser in good faith, and in the absence of or knowledge of fraud, of a promissory note before due is set aside, abrogated and held for naught. What are the legal rights of a qualified indorsee under the circumstances indicated? The indorser transfers the note to the indorsee “without recourse,” and in our opinion it simply precludes the indorsee from holding the indorser liable to him in the event the makers fail to pay the note. It is simply a contract between the indorser and indorsee which in no way inures to the benefit of or increases the legal rights of the makers, or either of them, against the indorsee. In other words, we think that a fair interpretation of the section of the General Code in question in no way changes the well established principle of law that a purchase of commercial paper for value, before due, in the absence of fraud and knowledge of any infirmity in the instrument, or defect in the title thereto, bars the makers of any defense.

Taking this view of the whole case, and finding no error in the record prejudicial to the rights of the plaintiffs in error, we are of the opinion that the judgment below is right, and should be affirmed.

Judgment affirmed.

SHIELDS, J., and POWELL, J., concur.

1916.]

Cuyahoga County.

**ARE SHERIFFS BOUND TO ACCOUNT FOR PROFITS ARISING
FROM FEEDING PRISONERS.**

*Court of Appeals for Cuyahoga County.

STATE OF OHIO, EX REL FRANK F. GENTSCH, v.

A. J. HIRSTIUS ET AL.*

Decided, July, 1915.

Office and Officer—Construction of the Salary Act with Reference to Profits Arising to the Sheriff from Feeding Prisoners—Sections 2996, 2997, 3046 and 2850.

There is no claim or obligation resting upon a sheriff to account for or pay over to the county or state the amount received by him for keeping and feeding prisoners during his term of office in excess of the actual cost of so doing.

F. F. Gentsch and F. W. Green, for plaintiff in error.

D. E. Morgan, contra.

CARPENTER, J.

Error to the court of common pleas.

This action was brought in the common pleas court by Frank F. Gentsch, Esq., on the relation of the state (the county prosecutor having refused to institute the same) to recover from the defendant, A. J. Hirstius, the sum of \$46,741.25 with interest, by reason of the same being the amount in excess of the actual cost of keeping and feeding the prisoners as provided by law during the time which he was sheriff of this county.

It is claimed by the plaintiff that Section 2996 of the General Code absolutely limits the compensation to \$6,000 per year which the sheriff can receive from all sources.

The question of law, therefore, is: Does the law create an obligation upon the defendant to return to the treasury of the state the sum of \$46,741.25. By reason of the demurrer to plaintiff's petition, the defendant's construction admits that such sum was his net profit.

*Affirming *State, ex rel Gentsch, v. Hirstius*, 15 N.P.(N.S.), 505.

Section 2996 is a portion of the salary law, so-called, enacted by the General Assembly on the 22d day of March, 1906, and took effect January 1st, 1907. This statute fixed the salaries of probate judges, county auditors, treasurers, recorders, clerks of the common pleas court and sheriffs. Following immediately the section relating to the salary which each of the foregoing officers shall receive, Section 18 of the act, now 2996 of the General Code, is as follows:

“And said salaries shall be in lieu of all fees, costs, penalties, percentages, allowances and of all other perquisites of whatever kind which any of the officials herein named may now collect and receive, provided, however, that in no case shall such *annual salary* payable to any of the officers aforesaid exceed the sum of \$6,000.”

Section 19 of the act provides as follows:

“The county commissioners shall, *in addition to the compensation and salary* herein provided, make allowances quarterly to every sheriff for keeping and feeding *prisoners* under Section 1235 of the Revised Statutes, and shall allow his actual and necessary expenses incurred or expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state asylum for the insane, the institution for feeble minded youth, etc., etc., and all expenses of maintaining horses, etc., necessary to the proper administration of the duties of his office. Every sheriff shall file under oath with the quarterly report herein provided for a full, accurate and itemized account of all his actual and necessary expenses, mentioned in this section, before the same shall be allowed by the *county commissioners*.”

The foregoing sections, 18 and 19, became Sections 2996 and 2997, respectively, upon the revision of the statutes in 1912. Slight grammatical changes were made in the provision. The words “*Section No. 1235 of the Revised Statutes*” were omitted, and the words “as provided by law” were substituted instead in the revision.

It is claimed that these two sections should be construed together, and also in connection with the entire statute, to the end

1916.]

Cuyahoga County.

that it may harmonize with the intent of the Legislature of placing all of the officers upon a fixed and stated salary, and that in any event none of said officers should be paid more than \$6,000. But it will be observed that the limitation of \$6,000 applies to the annual salary, for the statute provided that in no case shall the *annual salary paid any officer exceed \$6,000*.

The words "compensation" and "salary" have reference to two distinct things. Compensation evidently with reference to the actual expenditures made by the sheriff in the discharge of specified duties, while salary is limited to the amount to be paid annually.

It will also be noted that in every case where expenditures are authorized, the terms "actual or necessary" or, "actual and necessary," are used; and it also provided at the close of Section 2997: "Each sheriff shall file under oath with the quarterly report herein provided, a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section, before they shall be allowed by the commissioners." It will also be noted that no such restriction or requirement in reference to actual expenditures in keeping and feeding prisoners is provided in the statute, and that such is only required where the same is specifically authorized and report of same required.

This is a significant fact in arriving at the construction of this law. It is almost equivalent to saying that the sheriff shall not be required to keep and render an account of his expenditures in keeping and feeding prisoners. But the plain statement at the outset of Section 19 is of much greater significance, for it says: "The county commissioners shall, *in addition* to the *compensation* and *salary* herein provided, make allowances quarterly to every sheriff for keeping and feeding prisoners, as provided under Section 1235 of the Revised Statutes." This statute, which is now 2850 of the General Code, provides that "The sheriff shall be allowed by the county commissioners not less than 45 nor more than 75 cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may

allow any sum not to exceed 75 cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed clothing, washing and nursing when required, and other necessities as the court, in its rules, shall designate.”

Section 3046 of the General Code provides that “on the first Monday of September of each year, each county treasurer, recorder, sheriff, etc., shall make returns under oath to the county auditor of the amount of fees and moneys received by them or due them during the year next preceding the time of making the return.” There are other sections which provide for reports by the sheriff of moneys received or collected by him, but in none of them is a report required of him of any expenditure of or connected with the keeping and feeding of prisoners.

With these sections of the statute before us, what construction should there be given to said Section 19, now Section 2997 of the General Code? This section provides, in substance, that in addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners at a rate or price of not less than 45 cents nor more than 75 cents per day. In this case a rate was made of 50 cents per diem.

There is no ambiguity in the language of these two sections, and consequently they do not call for judicial interpretation. In other words, they mean exactly what they say, viz., that the allowances made by the commissioners are in addition to the compensation and the salary allowed by the statutes preceding.

The general rule of law is “that where there is in the same statute a particular enactment and also a general one which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment” (26 Am. & Eng. Enc., 216). This is the rule applied in the case of *Stone v. State of Ohio*, 18 C.C. (N.S.), 246, which is quite similar to the case at bar, where the court say:

1916.]

Cuyahoga County.

“It will not help in the interpretation of these statutes to criticize the apparent carelessness with which they seem to have been so complicated. We must suppose that the Legislature did not intend to do an unreasonable thing, that it had an object in view in amending and re-enacting these sections.”

Furthermore, it is to be borne in mind that the Legislature, by the enactment of Section 2850, gave full authority to the commissioners to allow not less than 45 nor more than 75 cents per day for keeping and feeding prisoners. It is a general rule of law that a court has no power to control the discretion which is given by the Legislature to another body, such as a town or city council, school board and even commissioners; and should we in the case at bar hold with the plaintiff, we should be guilty of controlling their discretionary power, and in effect fixing the rate which the sheriff should charge per diem. The Legislature has delegated to the commissioners the power and duty to fix the rate for keeping and feeding the prisoners, and specifically limits their discretion to an amount of not less than 45 nor more than 75 cents per day. Relief from the provisions of this statute manifestly should come from the Legislature and not from this court, regardless of our own opinion as to whether it is a good or bad law.

This statute was passed in 1906, about nine years ago. It has been recognized by the authorities of the state and county auditors, treasurers and public accountants; attorney-generals have held in favor of the sheriffs. The Legislature has not seen fit to change it, and it is a general rule that the practical construction given a doubtful statute by the state or officers whose duty it is to carry it into execution is entitled to great weight, and will not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous. *Southland Statutory Construction*, Section 472 and 474. *Dutout v. Doyle*, 16 U. S., 400-407; *State v. Aikens*, 18 C. C., 349.

The question of feeding the United States and city prisoners is of more difficult solution. We are satisfied with the views expressed by Judge Estep in his opinion upon overruling the demurrer in this case, as follows:

State, ex rel. v. Hirst.

[Vol. 35 (N.S.)]

allow any sum not to exceed 75 ¢
feeding any idiot or lunatic.

expense of the county to

those confined for debt

ing, washing and r

as the court, in

Section 30

Monday

corde

au

as the matter of feeding state pris-
soners required to account to the county or state
quarterly by the county commis-
sioner and that in this respect the Legislature
distinguish between state, federal and city prisoners?
the Legislature that he should pay into the
county the amounts received for feeding federal and
city prisoners and retain the amount received for feeding state
prisoners. We are right in the conclusion that the sheriff
allowances made to him for feeding state prison-
ers. It logically follows that it was never
the Legislature to classify in this respect the pris-
oners to his custody and therefore require him to feed
city and federal prisoners at his expense. It is reasonable to
say that the county and state having been put to no expense in
regard to subsisting these prisoners, and incurring no liability
in relation thereto, the sheriff should be required to pay into the
treasury of the county the amounts received by him from the
federal and city authorities in payment for the expenses he has
incurred in subsisting these prisoners? In other words, is it a
reasonable construction to place upon these statutes, which
would result in holding that the sheriff must subsist these pris-
oners at his own expense?

"The only reason why this money received by the sheriff from
the federal and city authorities should be turned into the county
treasury is that the salary act, Section 2977, provides that all
fees, allowances and other perquisites collected and received by
law, as compensation for services, shall be for the sole use of
the treasury of the county in which they are collected. The ques-
tion, therefore, presents itself as to whether or not these amounts
received by the sheriff for subsisting federal and city prisoners
are allowances or perquisites collected or received by law. In
my opinion the fees, allowances and perquisites referred to in
Section 2977 and Section 2996 of the code do not refer to any
fees, allowances or perquisites except such as are fixed by law for
services and duties imposed by law upon the sheriff. All these
fees, etc., are to be collected by him and paid into the county
treasury. These fees, allowances, etc., are fixed by Sections
2845-6 *et seq.* of the Code. The duty of subsisting federal and
city prisoners not being imposed upon the sheriff by law, and
any sum he may receive for such subsistence not being fixed
by law, but his compensation arising only from contract, I am
of the opinion that under the provisions of the salary act he is
not required to turn said moneys into the county treasury. This

1916.]

Hamilton County.

must be so, or else we are bound to conclude that he must render his service for nothing. Should the court place a construction on these statutes which would lead to this absurd consequence that it do an injustice to the defendant, when state and county have incurred no expense or liability in relation to such prisoners?

“In the case of *Moore v. Given*, 39 O. S., 661, the law is stated in the first syllabus: ‘It is the duty of the courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice or great inconvenience, as none of these can be presumed to have been within the legislative intent.’ ”

For these reasons we are constrained to hold that there is no obligation resting upon the defendant to account for or to pay over to the county or state the amount of money received by him for keeping and feeding prisoners during his term of office in excess of the actual cost for so doing, and therefore affirm the judgment of the court of common pleas.

SPENCE, J. (sitting in place of Meals, J.), concurs; GRANT, J., dissents.

**ACTION FOR DAMAGES FOR REFUSAL TO GRANT A
LIQUOR LICENSE.**

Court of Appeals for Hamilton County.

JULIUS THEURKAUF V. ROGERS WRIGHT ET AL.

Decided, January 31, 1916.

Liquor Licensing Officers—Not Answerable for Refusing to Grant a License—Character of Their Functions.

Liquor licensing boards perform quasi-judicial functions, and can not be held answerable in damages for errors or mistakes, if any are made, in the exercise of their functions.

H. P. Karch, for plaintiff in error.

Ellis G. Kinkead, John A. Deasy and Timothy S. Hogan, contra.

“Having already held that in the matter of feeding state prisoners the sheriff is not required to account to the county or state for the allowances made to him quarterly by the county commissioners, can it be fairly said that in this respect the Legislature intended to distinguish between state, federal and city prisoners? Was it intended by the Legislature that he should pay into the county treasury the amounts received for feeding federal and city prisoners, and retain the amount received for feeding state prisoners? If we are right in the conclusion that the sheriff may retain the allowances made to him for feeding state prisoners, it appears to me that it logically follows that it was never intended by the Legislature to classify in this respect the prisoners committed to his custody and therefore require him to feed city and federal prisoners at his expense. It is reasonable to say that the county and state having been put to no expense in regard to subsisting these prisoners, and incurring no liability in relation thereto, the sheriff should be required to pay into the treasury of the county the amounts received by him from the federal and city authorities in payment for the expenses he has incurred in subsisting these prisoners? In other words, is it a reasonable construction to place upon these statutes, which would result in holding that the sheriff must subsist these prisoners at *his own expense*?

“The only reason why this money received by the sheriff from the federal and city authorities should be turned into the county treasury is that the salary act, Section 2977, provides that all fees, allowances and other perquisites collected and received by law, as compensation for services, shall be for the sole use of the treasury of the county in which they are collected. The question, therefore, presents itself as to whether or not these amounts received by the sheriff for subsisting federal and city prisoners are allowances or perquisites collected or received by law. In my opinion the fees, allowances and perquisites referred to in Section 2977 and Section 2996 of the code do not refer to any fees, allowances or perquisites except such as are fixed by law for services and duties imposed by law upon the sheriff. All these fees, etc., are to be collected by him and paid into the county treasury. These fees, allowances, etc., are fixed by Sections 2845-6 *et seq.* of the Code. The duty of subsisting federal and city prisoners not being imposed upon the sheriff by law, and any sum he may receive for such subsistence not being fixed by law, but his compensation arising only from contract, I am of the opinion that under the provisions of the salary act he is not required to turn said moneys into the county treasury. This

v.]

Hamilton County.

e so, or else we are bound to conclude that he must render
vice for nothing. Should the court place a construction
statutes which would lead to this absurd consequence
injustice to the defendant, when state and county
ed no expense or liability in relation to such pris-

se of *Moore v. Given*, 39 O. S., 661, the law is
first syllabus: 'It is the duty of the courts, in the
ation of statutes, unless restrained by the letter, to
opt that view which will avoid absurd consequences, injustice
or great inconvenience, as none of these can be presumed to have
been within the legislative intent.' "

For these reasons we are constrained to hold that there is no
obligation resting upon the defendant to account for or to pay
over to the county or state the amount of money received by him
for keeping and feeding prisoners during his term of office in
excess of the actual cost for so doing, and therefore affirm the
judgment of the court of common pleas.

SPENCE, J. (sitting in place of Meals, J.), concurs; GRANT, J.,
dissents.

**ACTION FOR DAMAGES FOR REFUSAL TO GRANT A
LIQUOR LICENSE.**

Court of Appeals for Hamilton County.

JULIUS THEURKAUF V. ROGERS WRIGHT ET AL.

Decided, January 31, 1916.

*Liquor Licensing Officers—Not Answerable for Refusing to Grant a
License—Character of Their Functions.*

Liquor licensing boards perform *quasi-judicial* functions, and can not
be held answerable in damages for errors or mistakes, if any are
made, in the exercise of their functions.

H. P. Karch, for plaintiff in error.

Ellis G. Kinkead, John A. Deasy and Timothy S. Hogan, con-
tra.

GORMAN, J.

The action below was brought in the Superior Court of Cincinnati by plaintiff in error against Rogers Wright and William Marschheuser as the Hamilton County Liquor Licensing Board, and Charles L. Allen, Byron M. Clendenning and J. H. Secrest as the Ohio State Liquor Licensing Board, to recover \$20,000 damages for their alleged wrongful refusal and neglect to grant to plaintiff a license to traffic in intoxicating liquors in Cincinnati for the year beginning November 24, 1913, upon his application therefor duly filed in writing as provided by law; and plaintiff further averred that although he possessed all the qualifications requisite in law to entitle him to a license, said boards rejected his application solely on the ground that the number of licenses which could be issued under the Constitution and the laws had been exhausted and there were no more licenses to grant. Plaintiff further averred that he was one of those favored under the laws as entitled to a license because of his good standing and the length of time he had been engaged in the business prior to November 5, 1913. He claimed that as the direct result of the refusal of defendants to issue to him a license he was damaged in the sum above stated and prayed judgment therefor.

A demurrer to plaintiff's second amended petition was interposed by defendants and sustained by the trial court, and the plaintiff not desiring to plead further, his petition was dismissed.

It is claimed that in this ruling the court below erred.

This court is of the opinion that the court below did not err in sustaining the demurrer.

In 23 Cyc., 125, this rule is laid down:

"Licensing officers are not to be held answerable for mere mistakes or errors of judgment; but they are subject to indictment when their action in granting or refusing licenses was prompted by corrupt motives amounting to a gross abuse of discretion or a plain dereliction of duty. They are not personally liable in an action at law against them to recover damages alleged to have been sustained by their refusal to grant a license to plaintiff; the latter, if clearly entitled to a license, may enforce his rights by mandamus, but the proceeding on his ap-

1916.]

Seneca County.

plication is so far judicial as to protect officers from civil actions for damages," etc. Citing *Halloran v. McCullough*, 68 Ind., 179.

Under the law (103 O. L., 216-242 inclusive) the county licensing board has something more than ministerial duties to perform; it has *quasi-judicial* functions to perform; it must look into the character and qualifications of applicants for licenses, grant licenses which shall not exceed in number one for every five hundred inhabitants of the county, and perform many other acts calling for an exercise of discretion and judgment. They can not be held answerable in damages for errors or mistakes made by them in the exercise of such functions.

Most of the questions raised in this case were decided adversely to the contention of plaintiff in error by the Supreme Court in the case of *Meyer v. O'Dwyer*, 90 Ohio St., 341.

Judgment affirmed.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

**DESCENT OF THE DISTRIBUTIVE SHARE OF PERSONAL
ESTATE LEFT BY AN INTESTATE WIFE.**

Court of Appeals for Seneca County.

**ALLEN J. SENEY, ADMINISTRATOR, v. GEORGE E.
SCHROTH, ADMINISTRATOR.**

Decided, 1916.

Descent and Distribution—Wife Receives Her Distributive Share of the Personal Estate of Her Deceased Husband, and Dies Intestate—Said Personalty Descends to Her Heirs Generally.

S. died testate without issue, leaving A. W. S. his widow, and certain brothers and sisters and their legal representatives, his only heirs at law. A. W. S. elected not to take under the will of S., but took under the law her distributive share of S.'s personal estate, and subsequently died intestate without issue, leaving neither brother nor sister or their legal representatives.

Held: That A. W. S. took her distributive share of said personal estate by favor of the provisions of Sections 10571 and 8592, General Code, and not under any provision of Section 8574, General Code;

hence, the provisions of Section 8577, General Code, are not effective to divert the descent of such personal property from her heirs generally.

Allen J. Seney and Charles E. Derr, for plaintiff in error.
George E. Schroth, contra.

ROBINSON, J.

The facts, as alleged in the cross-petition of plaintiff in error, are, in brief, as follows:

George E. Seney died testate on or about the first day of June, 1905, leaving no issue, but leaving surviving him one brother, Henry W. Seney, since deceased; one sister, Frances M. Crum, since deceased; George E. Seney, Jr., a son of Joshua Seney, a deceased brother, and Bessie Schaler, a granddaughter of a deceased sister, Josephine Seney Wise. He also left surviving him his widow, Anna Walker Seney, who has since deceased, intestate and leaving no issue and no brothers or sisters or their legal representatives.

The said Anna Walker Seney elected not to take under the provisions of the last will and testament of George E. Seney, deceased, but elected to be endowed of the lands and tenements of which the said George E. Seney died seized, and took her distributive share of the personal estate of said George E. Seney, deceased, the sum of twelve thousand five hundred sixteen and fifty-one hundredths dollars. Said sum came into the hands of the defendant in error, George E. Schroth, as administrator of the estate of Anna Walker Seney, deceased.

The said George E. Schroth, as such administrator, commenced an action against the plaintiff in error and others, asking the instruction of the court in the distribution of said estate.

The said Henry W. Seney died intestate, leaving a widow and children.

The estate of Henry W. Seney is not sufficient to pay the indebtedness thereof.

The plaintiff is the duly elected, qualified and acting administrator of the estate of said Henry W. Seney, deceased, and as such filed his answer and cross-petition to said petition of said George E. Schroth, as administrator of the estate of Anna

1916.]

Seneca County.

Walker Seney, deceased, praying that he may be found entitled to the one-fourth of said twelve thousand five hundred sixteen and fifty-one hundredths dollars on distribution, and that said sum may be ordered paid to him as such administrator; to which cross-petition said George E. Schroth, as the administrator of the estate of Anna Walker Seney, deceased, filed a general demurrer, which demurrer was sustained by the court below, and judgment rendered against plaintiff in error.

Error is prosecuted here to reverse said judgment.

The plaintiff in error contends that under Section 8577, General Code of Ohio, the brothers and sisters of George E. Seney, deceased, or their legal representatives, are entitled, upon distribution, to the unconsumed portion of the personal estate received by Anna Walker Seney as her distributive share of the personal estate of George E. Seney, deceased.

Section 8577 of the General Code provides:

“When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of section eighty-five hundred and seventy-four, then such estate, real and personal, shall pass to and vest in the children of such deceased husband or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their personal representatives.”

Clearly this property did not come to Anna Walker Seney by deed of gift, devise or bequest. Did it then come to her under any of the provisions of Section 8574? Section 8574 of the General Code provides:

“If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows:

“1. To the children of the intestate and their legal representatives.

“2. If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

“3. If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

“4. If there are no brothers or sisters of the intestate of the whole blood, or their legal representatives, the estate shall pass to the brothers and sisters of the half-blood, and their legal representatives.

“5. If there are no brothers or sisters of the intestate of the half-blood, or their legal representatives, the estate shall ascend to the father; if the father is dead, then to the mother.

“6. If the father and mother are dead, the estate shall pass to the next of kin, and their legal representatives, to and of the blood of the intestate.”

There were no children in this case, and had there been no will, then clearly the whole estate would have passed by descent from George E. Seney to his widow, Anna Walker Seney, under subdivision 2 of Section 8574, and upon the death of Anna Walker Seney intestate, she leaving no brothers nor sisters or their legal representatives, would have passed, under Section 8577, to the brothers and sisters or their legal representatives, of George E. Seney, deceased. But George E. Seney died testate, and his widow elected not to take under said will. Did she then take the widow's portion of the personal estate under Section 8574 or did she take under Section 10571 of the General Code, which provides:

“The election of the widow or widower to take under the will shall be entered upon the minutes of the court. If the widow or widower fails to make such election, he or she shall retain the dower, and such share of the personal estate of the deceased consort as she or he respectively would be entitled to by law in case the deceased consort had died intestate, leaving children.”

And Section 8592 of the General Code, which provides:

“When a person dies intestate and leaves no children or their legal representatives, the widow or widower, as next of kin, will

1916.]

Seneca County.

be entitled to all the personal property which is subject to distribution upon settlement of the estate. If the intestate leaves any children or their legal representatives, the widow or widower will be entitled to one-half of the first four hundred dollars and to one-third of the remainder of the personal property subject to distribution.”

Section 8574 makes no provision for the widow where the intestate died leaving children. The widow, under the common law, was endowed of no portion of the personal estate of her husband. The right of the widow, therefore, to a portion of the personal estate of her deceased husband, arises entirely by statutory enactment and has no existence independent thereof, and is not a subject of equitable interpretation. However much justice there may be in the contention of the plaintiff in error that the same course of descent should obtain where the widow receives all the personal property by virtue of the provision of subdivision 2 of Section 8574, as where she receives but the one-third under the provisions of Section 10571 and Section 8592, said contention is sufficiently answered by the fact that she would receive no part of said personal estate in the absence of a statutory provision giving it to her. And the same legislative power which could provide that she should receive all of the estate under one set of circumstances and only one-third under another, could and did provide that where she receives it all and dies intestate and without issue, that it shall pass one-half to her brothers and sisters or their legal representatives and one-half to the brothers and sisters of her deceased husband or their legal representatives, but failed to make any such provision or any provision for succession under circumstances where she received but the one-third, and we can not say that the Legislature, in the amendment of 1857, did not intend to provide for the succession in the one case and in the other case allow it to descend as any other estate of which she might die possessed.

The amendment seems to have been made for the sole purpose of remedying the severity of the rule laid down in the case of *Brower v. Hunt*, and had the Legislature intended it to include all personal property which came to her as the relict of her de-

ceased husband it could, and undoubtedly would, have so declared. This seems to us the more apparent since all the sections of the code herein referred to antedate in time of enactment Section 8577, and must have been in contemplation of the Legislature creating said section, especially since by the very language of the section it was content to describe property held by descent under Section 8573 in general terms, but confined its operation, beyond property which came by deed of gift, devise or bequest, to property held under the provisions of a certain section, indicating an intention to limit its operation.

We are of opinion that the personal property which came to Anna Walker Seney as the widow of George E. Seney did not come to her by deed of gift, devise or bequest from her deceased husband, nor under any of the provisions of Section 8574, but on the contrary, that said personal estate came to said Anna Walker Seney by virtue of Section 10571 and Section 8592 of the General Code.

We are also of opinion that in the enactment of Section 8577, the Legislature did not intend to include all property which might come to the relict from a deceased husband, but only such property as was contemplated and included in the provisions of Sections 8573 and 8574 of the General Code.

We find upon a comparison of the provisions of the General Code with the Revised Statutes as they existed at the time of the amendment of 1857 to Section 8577, that the provisions then in force with reference to the election by the widow to take under the law and with reference to the distributive portion which the widow was then entitled to, were substantially the same as they are now, and we can not assume that the Legislature, in the enactment of the amendment of 1857 to said Section 8577, General Code, were not cognizant of that fact and were not also cognizant of the fact that all property which might come to a relict from a deceased husband was not included in the description contained in said Section 8577.

The judgment of the court below is therefore affirmed.

CROW, J., and KINDER, J., concur.

1916.]

Hamilton County.

ACTION FOR INJURIES BARRED BY A SETTLEMENT.

Court of Appeals for Hamilton County.

**WILLIAM F. KLAGES V. FRANK G. KRONENBITTER AND
FRANK T. KRONENBITTER.**

Decided, March 24, 1916.

*Third Person Injured by Collision of Two Motor Vehicles—Settlement
With the Owner of One of the Vehicles Bars an Action for Injuries
Against the Other.*

The agreement in issue in this case is more than a mere covenant not to sue; it is a contract in settlement in full for the injuries received for a specified sum of money which was paid, and bars an action on account of the same injuries against a party other than the one with whom the settlement was made.

James M. Hengst, for plaintiff in error.*C. D. Saviers*, contra.

ALLREAD, J.

Klages, the plaintiff below, brought suit against the defendants to recover for a personal injury alleged to have resulted from the negligence of the defendants in so operating their automobile as to collide with a motor truck of the Gambrinus Brewing Company, causing the latter to strike and injure plaintiff.

There is no averment in the petition that the Gambrinus Brewing Company was negligent.

The first defense of the second amended answer of the defendants is a general denial.

The second defense, so far as material, is as follows:

“On or about the 14th day of January, 1914, the plaintiff, William F. Klages, entered into a contract of settlement with the Gambrinus Brewing Company, the corporation mentioned and described in plaintiff’s petition, whereby, in consideration of the sum of eight hundred dollars (\$800), he, the said plaintiff, William F. Klages, on behalf of himself, his personal representatives and assigns, did covenant and agree with said the

Gambrinus Brewing Company that he nor they would at any time thereafter institute, maintain, or prosecute any proceeding at law or equity against the said the Gambrinus Brewing Company, its successors or assigns, for the purpose of recovering money or of having any other remedy against the said the Gambrinus Brewing Company, its successors or assigns for or on account of said accident, which occurred on November 9th, 1913, as a result of a collision between the automobile of the Gambrinus Brewing Company and the automobile in which the defendant had an interest.

“Defendant says that said sum of eight hundred dollars was a full, complete and adequate compensation for all of the injuries received by said plaintiff as he well knew at the time he received the same, as well as a bar to any claim against the defendants.”

A demurrer was overruled to the second defense above referred to, and the plaintiff not desiring to plead thereto, final judgment was rendered in favor of the defendants.

The only question, therefore, is whether such second defense is sufficient to constitute a bar to the plaintiff's cause of action. We think the agreement between the plaintiff and the Gambrinus Brewing Company as alleged in the above defense constitutes more than a mere covenant not to sue. The distinct averment was made that it was a contract of settlement. The consideration for such contract of settlement and covenant not to sue was eight hundred dollars, which is alleged to be the full amount of plaintiff's injuries. Having, therefore, received from the Gambrinus Brewing Company the full amount of his injuries and having executed a contract of settlement with the Gambrinus Brewing Company, the plaintiff would have no further right of action against the defendants who are alleged to have negligently contributed to the injury.

The judgment of the court of common pleas is, therefore, affirmed.

FERNEDING, J., and KUNKLE, J., concur.

1916.]

Lucas County.

AVOIDING A LEASE BECAUSE OF GAMBLING ON THE PREMISES.

Court of Appeals for Lucas County.

NASSR V. UPTON.

Decided, February 8, 1915.

Landlord and Tenant—Leased Premises Used for Gambling—Whether Amusement Devices Are Gambling Devices Not Determined by Elements of Skill or Chance—Motive of Lessor in Prosecuting an Action in Forcible Detainer Not Available as a Defense—Purpose of Section 5972, Relating to Leases for Property Used for Gaming.

1. By virtue of the provisions of Section 5972, General Code, when premises are occupied for gaming or lottery purposes the lease under which they are so occupied is rendered void at the instance of the lessor, and it is immaterial whether the result of the game or lottery depends on skill or chance or both.
2. The provision of the statute that if the lessor, knowing of the violation, fails forthwith to prosecute in good faith an action to recover possession of the premises, he shall be held criminally responsible, is intended to guard against the collusive prosecution of an action instituted for the purpose of relieving the lessor from criminal liability, and his motive in prosecuting the action of forcible detainer is not a defense to such action.
3. A preponderance of the evidence is all that is required in an action of forcible detainer, even though the action is based on a violation of Section 5972, General Code.
4. A landlord is not precluded from maintaining an action of forcible detainer against a tenant by the fact that he has subsequently leased the premises to a new tenant.

Southard, Southard & Rowe, for plaintiff in error.

Ben W. Johnson and C. B. Steinem, contra.

RICHARDS, J.

Charles A. Nassr, plaintiff in error, had the control of certain premises adjacent to Walbridge Park in the city of Toledo, which he leased to the defendant in error, Thomas A. Upton. Subsequent to the execution of this lease he brought an action in forcible detainer before a justice of the peace to recover posses-

sion of the premises on the claim that the same were being used for gaming and lottery purposes in violation of Section 5972, General Code. On the trial of the action the jury returned a verdict for the defendant and judgment was entered thereon. The court of common pleas affirmed that judgment, and this proceeding in error is brought to obtain a reversal of the judgments.

It appears from the bill of exceptions that the tenant, Upton, had been in the amusement business for a number of years, and that he conducted on the premises the sale of post cards, souvenirs and stamps, and conducted certain games called a box-ball alley, a ball rack, horse-racing machine, and a cane rack, where rings were thrown over canes. The tenant, on being called for cross-examination, testified that the horse-racing game was a machine with eight artificial horses, which were ball bearing and revolving, two on each track, with 112 numbers on the machine, and that the horses were numbered 1 to 8, and that in connection therewith there was a board with numbers, the duplicates of those on the machine. He further testified that he sold paddles, bearing the numbers of the horses, at five cents apiece; that "if your horse stops at 64 then whatever is on 64 on the board is yours;" that there was a separate part with numbers, and prizes attached to each number, and that there was no way of determining in advance where the horses would stop and no difference in the value of the prizes given in the horse-racing game. The tenant, in describing the cane-rack game, testified that he sold three rings for five cents, and that if the patron threw a ring over a cane he got that cane; that the canes were all of the same value, and if the patron did not throw a ring over a cane he was not supposed to get a cane. The other games appear to have been of similar character.

It was contended by the defendant that the plaintiff was not entitled to recover the premises in forcible detainer because he was not prosecuting the action in good faith, because the games conducted were not in violation of the statute for the reason that they were games of skill and dexterity, because the prizes were all of substantially the same value, and because occasional viola-

1916.]

Lucas County.

tions of the gaming and lottery laws would not justify a forfeiture of the lease. In pursuance of these claims and others of like character made by the defendant, sixteen separate requests to charge the jury were submitted to the justice of the peace, and the jury were so charged. The statute of Ohio, cited *supra*, provides, in substance, that when premises are occupied for "gaming or lottery purposes," the lease or agreement shall be void at the instance of the lessor, who may at any time obtain possession by action of forcible detainer before a justice of the peace. The statute further provides that if a person knowingly permits premises to be so used and occupied and fails forthwith to prosecute in good faith an action for the recovery of the premises, the lessor shall be considered as a principal in carrying on the business of gaming or lottery on the premises.

We will not undertake to review all the instructions which were given to the jury on the request of the defendant. It is apparent, however, that in those instructions the justice was altogether too stringent against the plaintiff in charging on the subject of the action being prosecuted in good faith. The only connection in which good faith is mentioned in the statute is that if the lessor knowingly permits premises to be used for the forbidden purpose and fails to prosecute in good faith, he would be liable as a principal in the business. The jury were told, in substance, that if the action was not brought for the purpose of suppressing games or lotteries, but in contemplation of similar games being thereafter conducted on the premises, then the action was not brought in good faith, and that if the plaintiff knew that the defendant had been conducting such games on the premises, had good reason to believe that he would continue so to do and failed forthwith to bring an action, but consented to the occupation and accepted rent in advance, then the plaintiff could not recover, and that if the action was brought by the plaintiff for the purpose of protecting himself from statutory liability, then he could not recover. We think this is not a fair statement of the rule as to the good faith of the plaintiff within the language of the statute to which reference has been made. If this were the law it would give no room for repentance on

the part of a lessor who originally had knowledge of and consented to the use of the premises for unlawful purpose, and it would follow that if he had at one time consented to such use he must thereafter remain criminally responsible for further violations.

It is contended that the transactions shown by the evidence do not constitute violations of the statute because of the evidence that the prizes were of equal or substantially equal value. If it appeared from the evidence that every patron on making an investment would receive a prize, much foundation might exist for the claim made, if the prizes were of equal or substantially equal value, but if one invested five cents in one of the games conducted by the defendant and if, under the conditions on which the game was operated, he might fail to win any prize, the transaction would be within the terms of the statute; nor is the transaction relieved from the inhibition of the statute by reason of the fact, if it be a fact, that the games were games of skill and not purely games of chance. The question is one which must be determined in each jurisdiction by the language of the statute there controlling, and under the Ohio statute it is unlawful to occupy any premises for gaming or lottery purposes, and it is immaterial whether the transaction involves skill or chance or both. See *Ulsamer v. State of Ohio*, 11 O. D. Re., 889; 30 Bull., 293, editorial, a decision of the circuit court sitting in Gallia county. The cases are collected in Words and Phrases, under the title "Gambling-Gaming."

At the request of the defendant the jury were charged that the plaintiff could not prevail unless his claim was established by clear and convincing proof of the defendant's guilt. We understand that the ordinary rule requiring a case to be established by a preponderance of the evidence is the rule applicable to this case, and that the plaintiff was not required to make out his case by any higher degree of proof than that of a preponderance of the evidence.

During the trial of the case it developed that Nassr had sold the building on the premises to Nora Mullen and that she transferred the same back to him on the morning on which the trial

1916.]

Lucas County.

before the justice was commenced. It is contended that by reason of these facts the plaintiff was not entitled to maintain the action. The lease to the defendant, Upton, had not, of course, by its terms expired; neither had the plaintiff parted with his title to the ground occupied by the building. We think the sale of the building would not of itself prevent the plaintiff from maintaining the action. The purchaser had not taken possession, and if the plaintiff could not maintain the action then he would continue liable under the criminal laws for future violations, because he was still the lessor of the real estate so far as the defendant is concerned. The rule in such cases is concisely stated in 24 Cyc., 1415, as follows:

“While it has been held that the landlord, after having executed a valid lease to a third person, has no longer a right of possession enabling him to maintain an action to recover possession from a former tenant, the better rule would appear to be that he has such an interest in the possession as will enable him to sue.”

Numerous cases are cited sustaining this proposition, and, among others, the case of *Cahn v. Hammon Bldg. Co.*, 8 O. D. Re., 656; 9 Bull., 112.

The record discloses that the case was not tried before the justice of the peace on the right theory, but was submitted on erroneous principles, prejudicial to the plaintiff. It follows that the judgments must be reversed and the cause remanded to the court of common pleas for further proceedings according to law.

Judgments reversed and cause remanded.

KINKADE, J., concurs; CHITTENDEN, J., not participating.

WHEN A DEED ABSOLUTE WILL BE DECLARED A MORTGAGE.

Court of Appeals for Athens County.

FLEMING ET AL V. MINX ET AL.

Decided, December 30, 1914.

Partition—Denied to Heirs and Devisees of a Lessor—Deed Absolute Will be Declared a Mortgage When Necessary to Relieve from Imposition or Injustice—Rights of Heirs Can Not be Reduced to Money by Administrator.

1. A court of equity will adjudge a deed absolute to be a mortgage at the instance of either grantor or grantee, or their representatives.
2. But such adjudication will not be made, at the instance of the personal representative, for the sole purpose of making it possible for him to collect the proceeds of such mortgage and distribute the same. A court of equity will declare a deed absolute to be a mortgage only when it is necessary to prevent or relieve from imposition or injustice.
3. The heirs at law and devisees of the lessor in a lease for ninety-nine years, renewable forever, with an option in the lessee to purchase the premises leased at a stated time each year during the continuance of the lease, can not compel partition of the same.

Grosvenor, Jones & Worstell, for plaintiffs.

Lewis & Keenan, for W. K. Scott, administrator.

L. A. Koons, for Elizabeth Nelson.

SAYRE, J.

The administrator with the will annexed of the estate of Daniel Fleming contends that the deed under consideration constitutes an equitable mortgage and desires an adjudication to that effect so he can foreclose the same and distribute the proceeds, while the plaintiffs claim that the transaction between Daniel Fleming and Elizabeth Nelson is a conditional sale and seek partition.

The contest here is between the administrator with the will annexed and the devisees and heirs at law of Daniel Fleming. Elizabeth Nelson is not interested in the matter except that her rights, whatever they may be, shall be protected.

1916.]

Athens County.

So we are called upon to decide whether a court of equity will construe a deed absolute on its face to be a mortgage, at the instance of the personal representative of the grantee of such deed, for the sole purpose of enabling such representative to collect and distribute the proceeds.

In *3 Pomeroy's Equity Jurisprudence* (3d Ed.), Section 1196, is the following:

“The general doctrine is fully established, and certainly prevails in a great majority of the states, that the *grantor* and *his representatives* are always allowed in equity to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt.”

The right here seems to be limited to the grantor and his representatives, and not to extend to the grantee and his representatives. But in *McMillan v. Bissel*, 63 Mich., 66, 29 N. W. Rep., 737, and *Kellog v. Northrup*, 115 Mich., 327, 73 N. W. Rep., 230, it was held that the grantee or his representatives may show that a deed absolute is in fact a mortgage. It would seem just that either grantor or grantee, or their representatives, should have the right, under proper circumstances, to show what the real transaction was. No reason can be assigned why one man should not have the same right as the other.

The precise question to be determined then is, Under what circumstances will a court of equity look beyond a deed absolute and receive evidence outside the same to determine what the real transaction was between the parties?

An examination of a number of cases will show that an attempt to convert that into an absolute sale which was intended as a security for a loan is treated as a fraud. *Morris v. Exr. of Nixon et al*, 1 How., 118, 126; *Russell v. Southard et al*, 12 How., 139; *Babcock v. Wyman*, 19 How., 289; *3 Pomeroy's Equity Jurisprudence* (3d Ed.), Section 1196.

Usually the value of the property conveyed is in excess of the money loaned, and the grantee, by insisting upon the transaction as appears from the language of the deed alone, will thus secure an unfair advantage, and at the instance of the grantor a court of equity will hear evidence, and if the deed was given to secure

a loan will declare the same to be a mortgage. The occasion for this action of the court is found wholly in the injustice which will result to the grantor. Consequently, if the grantor is satisfied with the transaction and it appears that no unfairness, imposition or injustice can result to the grantee, then the court will leave the deed to stand as an absolute conveyance.

A court of equity will treat a deed absolute as a deed absolute, unless by declaring it to be a mortgage injustice can be prevented.

In the case under consideration the grantor, Elizabeth Nelson, makes no complaint in regard to the transaction. From her answer it appears that she is willing to allow the deed to stand as a deed absolute. It appears that neither the heirs, devisees nor personal representative of Daniel Fleming will suffer any imposition or injustice by allowing the deed to stand as a deed. There is, therefore, no reason to examine the facts surrounding the transaction in order to determine whether the deed was made as a security for a loan. The only possible reason which the administrator with the will annexed can have for desiring the court to treat the deed as a mortgage is that he may collect the money and distribute the same in the course of administration. This is no ground for the action of a court of equity.

The plaintiffs desire partition of the premises conveyed by Elizabeth Nelson to Daniel Fleming, and the right to partition is contested by the defendant, Marcia Linscott, one of the heirs of Daniel Fleming.

The lease to Elizabeth Nelson for ninety-nine years, renewable forever, with option to purchase, is an estate in perpetuity on condition. It may be defeated by the lessee exercising the option to purchase, as a life estate may be defeated by the death of the life tenant.

In *Tabler v. Wiseman et al*, 2 Ohio St., 207, it was held that the heirs at law could not make partition in case the entire premises were assigned to the widow as her dower; and the reasons assigned for such holding were that a tenant in common could not derive any benefit from the partition; that where the property is subject to a life estate exclusive possession can not

1916.]

Hamilton County.

follow the judgment, and because the commissioners could not make equitable division if permitted to speculate upon the probable condition of the property at the termination of the life estate.

Now all these reasons apply with equal force to the situation in hand. The tenants in common have not the present right of possession to any part of the premises which they desire to have partitioned. Partition, therefore, will not lie.

Judgment accordingly.

WALTERS, J., and JONES, J., concur.

WHAT IS MEANT BY "BURDEN OF PROOF."

Court of Appeals for Hamilton County.

GEORGE C. BUTTEMILLER V. HOWARD WILLIAM SCHMID, BY HIS
NEXT FRIEND.

Decided, 1915.

*Evidence—Degree of Proof Necessary to Satisfy the Requirement as to
Burden of Proof—Instruction to Jury as to Burden of Proof Er-
roneous But Not Prejudicial.*

An instruction to the jury that "by burden of proof is meant the burden or duty of satisfying the minds of the jury of the truth of all the material facts alleged by the plaintiff and denied by the defendant," imposes too great a burden upon the plaintiff, but being prejudicial to the plaintiff only the defendant can not complain of the error so committed.

Robertson & Buchwalter, for plaintiff in error.

Jos. Lemkuhl, for defendant in error.

JONES (E. H.), J.

Plaintiff in error is a physician against whom judgment was recovered in the court below in favor of defendant in error for the sum of \$1,000, assessed by the jury as damages for malpractice in connection with the treatment of plaintiff for an injury.

By far the greater part of the brief for plaintiff in error, as well as the oral argument of counsel, is devoted to a discussion of the evidence. We deem it unnecessary to review the evidence in this opinion. It is sufficient to say we do not feel at all inclined to disturb the verdict of the jury or the judgment entered thereon for insufficiency of evidence to support it.

The other errors alleged relate to the charge of the court. Complaint is made of the following portion of the charge:

“By burden of proof is meant the burden or duty of satisfying the minds of the jury of the truth of all the material facts alleged by the plaintiff and denied by the defendant.”

The case of *C., H. & D. Ry. v. Frye*, 80 Ohio St., 289, is cited as authority to show that the word “satisfying” as used in this portion of the charge is prejudicial to the plaintiff in error. In the case cited it appears that the word “satisfied” was used by the trial court in its charge in connection with the attempt of the defendant to establish the defense of contributory negligence. Crew, C. J., in his opinion, on page 300, said:

“By this instruction the jury was told, not only that the burden of proof was on the defendant to establish its affirmative defense of contributory negligence by a preponderance of the evidence, but that if the defendant was negligent as charged, then plaintiff was entitled to a verdict ‘unless the defendant has so made out the truth of its affirmative defense.’ And the jury was thereby further told and instructed that such affirmative defense was so made out, ‘If the defendant has satisfied your minds by a preponderance of the evidence * * * that the plaintiff was guilty of negligence which contributed directly and proximately, together with the alleged negligence of the defendant, to produce this injury.’ This instruction, therefore, in effect, imposed upon the defendant the requirement—if it would make available the defense of contributory negligence—that it establish by a preponderance of the evidence the truth of such defense to the satisfaction of the jury. This was to place upon the defendant the obligation and burden of producing or furnishing a higher degree of proof than the law demands or exacts, and was therefore erroneous.”

In the case now under consideration the court in the portion of the charge in which the word “satisfying” is used erred not

1916.]

Hamilton County.

against the plaintiff in error, but to the prejudice of the defendant in error, upon whom too great a burden was imposed. It therefore follows that such error constitutes no ground for reversal in this case, as it did not result prejudicially to the party complaining.

The word "satisfy" was also used by the trial court in its charge on page 294 of the bill of exceptions, where the court charged the jury upon the doctrine of contributory negligence. This portion of the charge was later entirely recalled by the court, and the jury was instructed to pay no attention whatever to that part of the charge.

Our attention is also directed, by plaintiff in error, to the following language of the court:

"You have a right to accept or reject part or all of the testimony of a witness, and give credit to those witnesses who in your opinion are entitled to credit."

P., C., C. & St. L. Ry. v. Pritz, 90 Ohio St., 419, is relied upon in support of this assignment of error. The language there passed upon is not the same as the language here used. When considered in connection with the portion of the charge which immediately precedes it, we do not think that this portion of the charge is erroneous.

We therefore find no error in the proceedings below and the judgment will be affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

ACT OF GOD NOT EXCLUSIVE CAUSE OF LOSS.

Court of Appeals for Miami County.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY CO. v.
THE MYERS & PATTY CO.

Decided, November 17, 1915.

Shipment of Corn Damaged in Flood—After Being Delayed in Transit by a Defective Car—Negligence in the Matter of the Car—Deprives the Railway Company of the Defense of Act of God.

The act of God, to be a defense to an action on the contract of a common carrier, must be the sole cause of the loss or damage. If the negligence of the common carrier brings the goods in contact with the forces of nature, the carrier is liable. *Daniels v. Ballantine et al*, 26 Ohio St., 533, distinguished.

Broomhall & Broomhall, for plaintiff in error.

William H. Gilbert, contra.

ALLREAD, J.

On March 19, 1913, the Myers & Patty Company, at a point near Covington, Ohio, delivered to the C., H. & D. Railway Company a carload of corn for shipment to Rheems, Pennsylvania.

The car of corn reached Dayton, Ohio, on the evening of the day of shipment and was placed upon a siding and so remained until the forenoon of March 25, 1913, when it was overtaken and damaged by the great flood.

The Myers & Patty Company thereupon brought suit against the C., H. & D. Railway Company for failure to safely carry and deliver the goods shipped according to the consignment contract.

The railway company interposed the defense that the corn was destroyed by the act of God.

To this the plaintiff replied that the destruction or injury to the corn was due to negligence of the railway company in furnishing a defective car, necessitating delay in reloading at Dayton, and that the negligence of the railway company caused or at least contributed to the injury to the corn.

1916.]

Miami County.

Under the issues the case was submitted to a jury.

The facts are not seriously disputed and the question is largely one of law.

It was established that but for the defective car the shipment would have left Dayton promptly and would have passed out of the flood zone in safety.

At the close of the evidence the railway company moved for an instructed verdict upon the ground that the loss was due to the unprecedented flood.

The trial court overruled the motion and permitted the case to go to the jury under instructions in substance that if plaintiff in error was negligent as specified in the reply, and such negligence contributed to the loss or damage to the corn, then the fact that the act of God may have also contributed to the loss was no defense.

It is clear that when the railway company received the carload of corn consigned to Rheems, Pennsylvania, it was bound to promptly make such shipment and delivery unless excused by the act of God, the public enemies, the conduct of the shipper, the inherent nature of the goods or, as held in some cases, by the act or mandate of public authority. *Railroad Co. v. O'Donnell*, 49 Ohio St., 489.

The law holds the carrier to a high degree of responsibility for the safe carriage and delivery of the goods shipped, and the burden is upon him to aver and prove his defense when he claims an exemption.

The great weight of authority is to the effect that the act of God, in order to constitute a defense for the carrier, must be the exclusive cause of the injury. *Read v. Spaulding*, 30 N. Y., 630; *Michaels v. New York Central Rd. Co.*, 30 N. Y., 564; *Wolf v. American Express Co.*, 43 Mo., 421; *Bibb Broom Corn Co. v. A., T. & S. F. Rd. Co.*, 94 Minn., 269; *Alabama Great Southern Rd. Co. v. Quarles & Coutrie*, 145 Ala., 436; *Wabash Rd. Co. v. Sharpe*, 76 Neb., 424; *Wald v. P., C., C. & St. L. Rd. Co.*, 162 Ill., 545; *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, 130 Iowa, 123, 5 L. R. A. (N. S.), 882.

The case of *Read v. Spaulding*, *supra*, holds that if a common carrier receive goods for transportation and in consequence of

his unreasonable delay in forwarding them to their destination they are damaged by the act of God at an intermediate place, he is responsible to the owner. To exempt himself from liability he must show that no act or neglect of his concurred in or contributed to the injury.

The doctrine is thus stated in *Wolf v. American Express Co.*, *supra*:

“The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause, and when the loss is caused by the ‘act of God,’ if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible.”

Wabash Rd. Co. v. Sharpe, *supra*, in the second paragraph of the syllabus, states the same proposition as follows:

“A common carrier is responsible for injury to goods where the goods were exposed to injury by the carrier’s inexcusable detention, and the carrier can not in such case plead the act of God as a defense.”

Wald v. P., C., C. & St. L. Rd. Co., 162 Ill., 545, holds:

“A common carrier is not exempt from liability for a loss occasioned by an act of God, if the carrier has been guilty of any previous negligence which brings the property in contact with the destructive force or unnecessarily exposes it thereto.”

The case of *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, *supra*, contains a review of all the authorities and holds that reason and the weight of authority sustain the view that the act of God is available as a defense only when it is the sole cause of the loss.

In commenting upon *Coggs v. Bernard*, 1 Smith’s Leading Cases (8th Ed.), 369, 430, speaking on this subject the author says:

“The true way of looking at this is not that the carrier discharges his peculiar liability by showing an act of God, and is then made responsible as an ordinary agent, for negligence; but that the intervention of negligence breaks the carrier’s line of defense, by showing that the injury or loss was not directly

1916.]

Miami County.

caused by the act of God, or more correctly speaking, was not the act of God.”

The railway company relies upon the case of *Daniels et al v. Ballantine*, 23 Ohio St., 533, and *Urbana Egg Case Co. v. Nypano Rd. Co. et al*, 16 N.P.(N.S.), 321.

Daniels et al v. Ballantine et al involved the relationship of a private carrier and was founded upon negligence. The obligation of a common carrier is more comprehensive and exacting than that of a private carrier. The common carrier is to a degree an insurer of safe carriage and delivery and its liability is founded upon contract. In an action upon the common carrier's contract it follows that while the act of God is a recognized defense, yet in order to claim the benefit thereof, the common carrier must himself be free from fault or negligence.

The egg case company case was one of mere delay. There was no charge of positive negligence as in the case at bar. Whether that difference calls for a distinction in legal rights we are not called upon to decide.

The evidence was sufficient to justify the jury in finding that the C., H. & D. Railway Co. furnished a defective car, in which the corn was loaded, that this necessitated reloading, and that the car was held in Dayton for that purpose. The delay was the natural and proximate result of the furnishing of the defective car.

Under the evidence, therefore, the railway company was chargeable with the delay so occasioned. Such negligence made the injury to the corn by the flood possible. The carrier is therefore liable.

Judgment affirmed.

FERNEDING, J., and KUNKLE, J., concur.

DEGREE OF CARE REQUIRED OF A CARRIER TOWARD ITS PASSENGERS.

Court of Appeals for Hamilton County.

CINCINNATI TRACTION CO. v. WILLIAM BURKHARDT.

Decided, June 14, 1915.

Negligence—Car Started Before Passenger Was Seated—Measure of Care Required of a Carrier—Proper Instruction to the Jury With Reference to the Care to be Exercised by a Passenger in a Crippled Condition.

1. It is not negligence *per se* to start a street car before a passenger who has just stepped upon the car has had time to be seated.
2. The degree of care required of a carrier toward a passenger is not to be measured by the care which would be exercised under similar circumstances "by very careful and skillful employees," but it is the highest degree of care which ordinarily careful and skillful persons would use under like circumstances.
3. It would be error to charge that a passenger in a crippled condition was bound to exercise "greater care" than others, but the jury should be instructed that in determining whether he exercised ordinary care they should consider his crippled condition and any burden or impediment to his movements arising therefrom.

Kinhead & Rogers, for plaintiff in error.

Cogan, Williams & Ragland and *Thos. L. Michie*, contra.

JONES (E. H.), J.

This action was brought in the common pleas court by the defendant in error against the plaintiff in error for damages by reason of injuries received by him while boarding a car of the traction company.

The complaint in the petition was that the car was started with a sudden jerk, while plaintiff was in the act of boarding it and before he had reached a seat in the car, causing him to be thrown to the street and severely injured. The charge of negligence was denied by the traction company in its answer, which also contained an allegation of contributory negligence on the

1916.]

Hamilton County.

part of plaintiff. The jury returned a verdict in favor of the plaintiff for \$3,000, which the trial court reduced to \$2,000, for which sum judgment was rendered in the court below.

A number of errors are assigned in the petition in error and urged by counsel in oral argument.

The first alleged error upon which we deem it necessary to comment in this opinion relates to a portion of the general charge of the court, as follows:

“If you find that the defendant was not negligent, you need go no further, but must bring in a verdict for the defendant. If you find that the defendant was negligent in suddenly starting the car without notice, before the plaintiff had the opportunity to be seated, and that such negligence was the direct cause of the injury to plaintiff, you will bring in a verdict for the plaintiff unless you find that the plaintiff was also negligent, and that his negligence operating concurrently with the defendant’s negligence, if any, directly contributed as a cause of the accident.”

It is claimed that the court erred in the use of the language “if you find that the defendant was negligent in suddenly starting the car without notice, before the plaintiff had an opportunity to be seated,” etc. It is not negligence *per se* to start a street car before a passenger is seated therein. The objection made to this charge, which we think is well founded, is that it implies that the defendant company in this case was negligent if its employees started the car in question before plaintiff had reached a seat. No where in the general charge do we find any explanation of this language or any language which could be construed as a refutation of the implication to which it is susceptible. It may be, and it is quite probable, that the learned judge did not intend to convey to the jury an instruction to the effect that the starting of a car while a passenger was yet unseated is negligence. It was, however, charged in the petition as one of the grounds of negligence that the car was so started, and a fair interpretation of the language used by the trial court would lead the jury to believe that if they found that the car was started before Burkhardt had an opportunity to be seated that the company would be guilty of negli-

gence. This is not the law, and the question having been raised by the pleadings and the evidence it was incumbent upon the court to charge the jury clearly upon this matter, and its failure so to do was in our opinion prejudicial error.

The next alleged error considered is also based upon the language of the court in its general charge as found on page 111 of the bill of exceptions, as follows:

“The defendant is a common carrier of persons, but as such does not insure its passengers against all hazards incident to their transportation.

“It is required to exercise through its servants, such as the conductor and motorman, a very high degree of care, skill, diligence and foresight, such as is and should be exercised by very careful and skillful railroad employees under similar circumstances, to avoid injury to those whom it carries as passengers.”

We are of the opinion that this incorrectly states the degree of care required of those in charge of the car even to a passenger, and that, too, to the prejudice of the defendant company. The degree of care required of a carrier towards a passenger is not to be measured by the care that would be exercised under similar circumstances by very careful and skillful employees. The correct rule, it seems to us, is that the carrier owes to the plaintiff the highest degree of care which ordinarily careful and skillful persons would use under similar circumstances. If the rule laid down by the trial judge were the correct one, then all carriers of passengers would be required as a matter of self-protection to employ only “very careful and skillful” men. The rule laid down by the trial court in this case could not be observed by any other kind of men, and the carrier would therefore be liable unless the servants or employees connected therewith were very careful and skillful men.

The next alleged error urged by counsel is based upon the refusal of the court to give special charge No. 2:

“If you find that the plaintiff’s right hand was crippled by the loss of two fingers, and that when he boarded the car his left arm was incumbered by one or more bundles, I charge you that under such circumstances it was the duty of the plaintiff-

1916.]

Hamilton County.

iff to exercise greater care for his safety than would have been demanded of him had his right hand not been crippled and had he been free from bundles or packages.”

We think that the court was correct in refusing to give this charge. The words “greater care” as used in the charge requested are misleading and not permissible. The plaintiff was required to exercise ordinary care, and if a special instruction as to his duty was deemed necessary by counsel it should have been to the effect that in determining whether plaintiff exercised ordinary care the jury should consider his crippled condition and any burden or impediment to the free use of his arms or hands which may have been present in the case.

The other ground of error to which our attention has been especially called is that designated by counsel for plaintiff in error as “misconduct of the plaintiff in the trial below.” Briefly stated this charge is based upon the claim of plaintiff in his petition and during the trial that prior to this accident he was an able-bodied man, never sick, and always able to work; and that after the verdict of the jury was returned it was first ascertained by counsel for the traction company that this same plaintiff had, several years before, been injured while in the employ of a printing company in this city, and had brought an action for damages against said printing company alleging in his petition in that case that he was by said injury so received by him, made sick, feeble and permanently disabled. We do not deem it necessary to enter at length upon a discussion of this point since from the view we take of the case it must be reversed on other grounds and remanded for a new trial. There seems to be no question of the relevancy of the evidence, and we deem it unnecessary to say anything further about it.

For the reasons given, the judgment will be reversed and the cause remanded to the court of common pleas for a new trial.

JONES (Oliver B.), J., and GORMAN, J., concur.

STREET CAR PASSENGER INJURED WHILE RIDING ON THE BUMPER.

Court of Appeals for Franklin County.

MCGINN v. THE COLUMBUS RAILWAY & LIGHT COMPANY.

Decided, March 20, 1913.

Passenger on Crowded Street Car—Rides on Bumper and Was Injured—Passenger Not Chargeable with Negligence in so Doing, When.

1. Where a street car and the platform thereof are crowded with passengers, it is not negligence *per se* for a person desiring to become a passenger to take a position upon the bumper of such car, when such person pays a fare and is otherwise recognized by the conductor in charge of such car as a passenger.
2. Where it is averred in the petition and there is testimony tending to prove the averment that the motorman in charge of a street car immediately following knew of the position of such passenger upon the bumper, or by the exercise of ordinary care could have known such fact, it was the duty of such motorman to exercise reasonable care to protect such passenger so riding upon the bumper. *The Columbus Ry. Co. v. Muns*, 6 C.C.(N.S.), 236, distinguished.

Belcher & Connor, for plaintiff in error.

Booth, Keating, Peters & Pomerene, contra.

KUNKLE, J.

Plaintiff in error, John P. McGinn (being the plaintiff below), sought to recover judgment against defendant in error, the Columbus Railway & Light Company (being the defendant below), in the sum of \$10,300 for damages alleged to have been sustained by reason of the negligence of defendant in error in the operation of one of its street cars in the respects stated in detail in the petition.

Upon the trial of the case, at the conclusion of the testimony of plaintiff in error, the trial court directed the jury to return a verdict in favor of defendant in error.

Plaintiff in error claims that the trial court erred in directing such verdict.

1916.]

Franklin County.

The court evidently based its decision upon the case of *Columbus Ry. Co. v. Muns*, 6 C.C.(N.S.), 236, an opinion by the circuit court of this district.

In the Muns case it appears from the opinion of the court that the conductor in charge of the car did not see Muns or know of his position upon the bumper. He did not collect fare from Muns or do anything which recognized him as a passenger upon the car in question. It further appears from the opinion of the court that the manifest weight of the evidence was to the effect that there was room in the car, and that Muns did not attempt to get upon the steps or platform. It also appears that the officials of the company did all that was within their power to stop the descending car for the purpose of preventing injury to Muns. It is apparent from this decision that the court did not consider that the rule known as the "last chance" was involved in the case.

In the case at bar plaintiff in error, with a number of his friends, attempted to board a C., D. & M. car at Third avenue and Summit street, in this city. On account of the crowded condition of the car some of the party went to the front of the car but could not get on and then returned to the rear of the car. Three of the party succeeded in getting on the rear steps of the interurban car, and the other four, including the plaintiff, got on that portion of the car known as the bumper.

When they boarded the interurban car one of the cars of the defendant company, being the car which subsequently collided with the interurban car and injured the plaintiff, was a short distance behind the interurban car. The testimony differs as to the distance which the said city car was from the interurban car at this time. Plaintiff says it was about ten feet. Other witnesses place it at a greater distance.

The accident occurred at the corner of Seventh avenue and Summit street on October 16, 1910, at about 9 o'clock A. M. It was a bright, clear day. There was testimony to the effect that the interurban car had made several stops between Third avenue and Seventh avenue for the purpose of receiving and discharging passengers.

It is apparent from the testimony that the interurban car was crowded at the time plaintiff and his companions boarded the same. One of the witnesses described it as being loaded to the steps. The witnesses substantially agree that the car was so crowded that but three of the party were able to get on the steps, and that the other four members of the party, including the plaintiff, got upon the bumper because of their inability to get in the car.

The witness Doebele, who was riding with the plaintiff, says he paid his fare to the conductor. The plaintiff testifies that he paid the conductor a five-cent fare. The other two members of the party, who were riding on the bumper at a different place, did not pay their fare. Plaintiff was asked, on page 35 of the record:

“Q. Did the conductor see you and your companions who were standing outside the vestibule? A. Yes, sir.

“Q. I will ask you to state whether he collected a fare from you or not? A. Yes, sir.

“Q. Do you know what you paid? A. Five cents.”

On pages 37 and 38 of the record the plaintiff testifies:

“Q. Did you see this Summit street car when you stopped at Fourth and Summit? A. Yes, sir.

“Q. Just tell the jury what that car did and what happened there. A. Well, the conductor got off there, off of our car, and his car ran up pretty close.

“Q. Whose car ran up pretty close? A. The city car.

“Q. The Summit street car? A. Yes.

“Q. Go on. A. The Summit street car ran up pretty close to us, and the conductor got off and started to tell him not to get so close.

“Motion by the defendant to strike out the answer.

“The Court: I would be inclined to say if the motorman's attention was called to the danger of running into the car, it would be competent, if he heard it.

“Witness: Yes, sir.

“The Court: You may state what he said to the motorman.

“Witness: Well, he told him to stay back a little. That is all I heard. I did not pay any more attention to it.

“Q. Did the conductor from your car say anything else to the conductor or the motorman on the rear car, and if so,

1916.]

Franklin County.

what was it? A. Well, if I could understand right, he told him he had a big load; to kindly stay back."

The plaintiff also testified that when he got on at Third avenue, he motioned or signaled the motorman in charge of the city car to stay back.

"Q. When you made those motions or at any time, did you see the motorman on the Summit street car looking at you? A. Right at me, yes, sir.

"Q. How far were you from him when you made those signs or motions? A. I judge about ten feet; can't tell exactly."

The plaintiff also testified as follows in regard to the accident (page 42 of the record):

"Q. When was the first time you saw that car during your stop or at your stop there at Seventh avenue and Summit street? A. Why, it was just—I just happened to look around; just like that; just looked around.

"Q. Over your shoulder? A. Over my shoulder, and I says: 'Lay in fellows.' I says, 'We are up against it.' Just like that, and we laid in as close as we could.

"Q. And how close was the Summit street car to you when you saw it? A. Well, it just hit when I said that; just when I leaned over.

"Q. I will ask you to state whether or not from the moment you saw the Summit street car, just before it ran into you, up until you were struck, you had time to jump and get out of the way or to escape the danger? A. No, sir."

In the case at bar there is testimony tending to show that plaintiff and at least one of his companions, while riding on the bumper, were treated by the conductor as passengers on the car; that fare was collected from plaintiff and one of his companions; that the car was in such a crowded condition that the plaintiff could not have gotten either in the car or upon the rear steps thereof; that the interurban car was in plain view of the motorman in charge of the city car from the time the plaintiff boarded the interurban car at the corner of Third avenue and Summit street until the collision at the corner of Seventh avenue and Summit street; that the interurban car was not only in plain view of the motorman in charge of the city car

during all this time, but that the conductor in charge of the interurban car notified the motorman in charge of the city car, when at Fourth avenue, of the fact that he had a heavy load and requested the motorman in charge of the city car to stay back, and that the plaintiff signaled the motorman in charge of the city car to stay back when his car came close to the interurban car at Third avenue and Summit street.

Was the plaintiff below entitled to have the jury instructed in regard to the rule of law known as the "last chance"? Was he entitled to have this proposition submitted to the jury?

The only averment in the petition which would have warranted the submission of this doctrine was the following:

"That plaintiff and the car upon which he was a passenger were all of the time in plain view of the said motorman of said company, and said motorman saw plaintiff and said car, or by the exercise of ordinary care could have seen them, but said motorman negligently and carelessly failed and neglected to check the speed of said car in time to prevent said collision, although by the exercise of ordinary care he could have brought said car to a full stop without striking plaintiff or said car."

This paragraph of the petition contains the averment that the motorman saw plaintiff on said car, or by the exercise of ordinary care could have seen him. The averment is in the disjunctive. In the absence of a motion to make the petition more definite and certain the plaintiff was entitled under this averment to prove either that the motorman actually saw the plaintiff in his perilous position on the car, or by the exercise of ordinary care could have seen him.

There was testimony tending to show that the motorman in charge of the city car knew of the position of the plaintiff from the time he boarded the interurban car at Third avenue until the time of the accident.

In the case of *Drown v. Northern Ohio Traction Co.*, 76 Ohio St., 234, 249, the court, in discussing under what circumstances the "last chance" rule should be given, states:

"Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that the defendant after having notice of the plaintiff's peril could have

1916.]

Franklin County.

avoided the injury to plaintiff and there is no testimony to support such charge, the giving of such a charge would be erroneous."

The converse of this proposition must necessarily be true, viz., if there is a charge in the petition that the defendant had notice of the plaintiff's peril and could have avoided the injury, and there is testimony tending to show that the defendant had notice of the plaintiff's peril and could have avoided the injury, then such issue should be submitted to the jury under proper instructions.

In the case of *Erie R. R. Co. v. McCormick*, 69 Ohio St., 45, Judge Shauck, at page 53, defines the rule of law known as the "last chance" as follows:

"The concrete rule upon the subject is, that if one is upon the track of a railway company by his own fault and in peril of which he is unconscious, or from which he can not escape, and these facts and conditions are actually known by the engineer, it is his duty to exercise all reasonable care to avoid the infliction of injury."

We think there is evidence tending to show that the plaintiff below, by reason of the previous signal which he had given the motorman, and by reason of the conversation which occurred between the conductor of the interurban car and the motorman of the city car with reference to the city car staying back, was entitled to assume that the motorman in charge of the city car would control his car and avoid a collision; that the first intimation he had that the motorman in charge of the city car would not keep his car under control was when the city car was about to collide with the interurban car and that the plaintiff was then unable to escape from the peril in which he was placed.

As above stated, we think, under the averments of the petition herein quoted, the plaintiff was entitled to show that the motorman in charge of the city car actually knew of his peril and could have avoided the injury by the exercise of ordinary care, and after having introduced evidence tending to establish

such facts, was entitled to have this question submitted to the jury.

Holding this view, the judgment of the lower court will be reversed and the case remanded for a new trial.

Judgment reversed.

ALLREAD, J., and FERNEDING, J., concur.

QUO WARRANTO AGAINST A LIFE INSURANCE AGENT.

Court of Appeals for Franklin County.

STATE, EX REL HOGAN, ATTORNEY-GENERAL, V. RENSCHLER.*

Decided, April 3, 1913.

Jurisdiction of the Courts of Appeals—Quo Warranto Against One Charged with Doing a Life Insurance Business Without Authority—Action Brought in Franklin County—Defendant Served in Another County—Service Upheld.

An action in *quo warranto* may be brought in the court of appeals of Franklin county against an individual charged with transacting insurance business contrary to the insurance laws, although such individual be a resident of another county and served with summons in said county.

Timothy S. Hogan, Attorney-General, *Frank Davis, Jr.*, and *Charles J. Pretzman*, for relator.

Arlene, Betts & Kerns, for respondent.

KUNKLE, J.

The petition states that defendant, John Renschler, has since on or about March 1, 1912, within this state, to-wit, in the county of Hancock, offended against the laws of the state and usurped and exercised authority and privileges not granted him, in that he has insured the lives of certain persons in the amounts stated in the petition and issued to such persons life insurance policies, called mutual notes, copies of which are attached to the petition.

*Affirmed, *Renschler v. State, ex rel*, 90 Ohio State, 363.

1916.]

Franklin County.

The clerk of the court of appeals of this county issued summons to the sheriff of Hancock county, who served a copy of said summons upon the defendant in Hancock county.

The defendant, expressly disclaiming any intention of entering his appearance and objecting to the jurisdiction of this court over his person, moves the court to quash and set aside the pretended service in the county of Franklin or in any other county within the territorial jurisdiction of this court, but was in fact attempted to be served upon him in the same county of his residence by the sheriff of Hancock county, and not otherwise.

Sections 345 and 12311, General Code, are as follows:

“The Attorney-General may prosecute an action, information, or other proceeding in behalf of the state, or in which the state is interested, except prosecutions by indictment in the proper court of Franklin county, or of any other county in which the defendant or one or more of the defendants reside or may be found. No civil action, unless elsewhere specially provided, shall be commenced in Franklin county, if the defendant or one or more of the defendants do not reside or can not be found therein, unless the Attorney-General shall certify on the writ that he believes the amount in controversy exceeds five hundred dollars.

“An action under this chapter can be brought only in the Supreme Court, or in the circuit court of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated, or has a place of business; except that, when the Attorney-General files the petition, it may be brought in the Circuit Court of Franklin County.”

The defendant claims that these sections of the General Code have no application for the following reasons:

“1. Being enacted prior to the constitutional amendment they can not apply to a court created by such amendment excepting to the extent provided by such amendment, viz., pending cases.

“2. The amendment expressly provides as to new cases the jurisdiction of the court shall be governed by the ‘provisions hereof’ thus negating the application of existing statutes and precluding future enactments on the subject.

“3. Any construction of either of these sections that would give the Circuit Court or the Appellate Court of Franklin

County a special jurisdiction not common to the powers of the same court in other counties of the state would make that part of the sections void as special legislation."

These sections, in so far as they relate to the right of the circuit court of this county to entertain jurisdiction over defendants who are not residents of this circuit district, have been before our Supreme Court upon different occasions. The latest expression of the Supreme Court upon this question that we recall is found in the case of *Cleveland Terminal & Valley Rd. Co. v. The State*, 85 Ohio St., 251. Judge Shauck, in rendering the opinion, says at page 292:

"The propositions to be taken as established are: the state became the owner in fee of all the lands, which it originally used in the construction of its canal system, including the lands in controversy; *quo warranto* will lie to protect the interest of the state in lands so acquired; *the Circuit Court of Franklin County had jurisdiction of the subject of the action.*"

Do the sections of the General Code above quoted apply to the courts of appeals? We have considered the reasons suggested by counsel for defendant in their briefs and are of the opinion that the court of appeals of this county has the same jurisdiction over the subject of this action that the circuit court would have had prior to January 1.

We think the statutory provisions relating to the jurisdiction of and procedure in the circuit courts apply to the courts of appeals, except as the same may have been expressly modified by Section 6 of Article IV of the Constitution, which took effect January 1, 1913.

This section of the Constitution provides, among other things, that the courts of appeals shall continue the work of the respective circuit courts, that all pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals and be taken to the Supreme Court "as now provided by law," that the cases brought into said courts of appeals after the taking effect of the amendment shall be subject to the provisions thereof, and that the circuit courts shall be merged into and their work continued by the courts of appeals.

1916.]

Lorain County.

We think this construction is sustained by the recent decision of the Supreme Court in the case of *State, ex rel Chittenden, v. Harmon, Governor*, 87 Ohio St., 364, in which the court hold at page 376:

“Another provision is much more significant with respect to the question before us: ‘The circuit courts shall be merged into and their work continued by the courts of appeals.’ While this form of expression would hardly be anticipated in an instrument of the character of this, it can not be regarded as the mere equivalent of: ‘The circuit court shall be succeeded by the court of appeals.’ It obviously denotes a more intimate relation between the circuit courts and the courts of appeals than would be denoted by the provision that the latter should succeed the former. It being clear that there was intended no such difference in the Constitution or functions of the intermediate courts as would make an election to one court inconsistent with service in the other, there being expressed the practical functional identity of the courts in the provision that judges actually serving in one should serve in the other, and there being in the provision lastly quoted a characterization of the transition which clearly retains a more intimate relation than that of mere succession, we think the language employed, considered with the objects to be attained, properly leads to the conclusion that by virtue of his election the relator will be entitled to exercise the functions of a judge of the court of appeals for six years from February 9, 1913.”

The motion will be overruled. Motion overruled.

ALLREAD, J., and FERNEDING, J., concur.

PENALTY FOR NON-PAYMENT OF LIQUOR TAX.

Circuit Court of Lorain County.

S. SUSAN V. O. E. HASERODT, AUDITOR, ET AL.*

Decided, April 26, 1911.

Intoxicating Liquors—Addition of Penalty to Assessment—Can Not be Recovered from One Engaged in the Traffic Without Payment of the Tax.

*Affirmed without opinion, *Haserodt v. Susan*, 88 Ohio State, 578.

The penalty of 20 per cent. imposed by Section 6082 upon one who engages in the liquor business without paying an assessment, is applicable to the assessment imposed by that section alone, and not by preceding sections, and such penalty can be recovered back where paid by one who had not paid the assessment and had not refused information to the assessor. Tax laws should be liberally construed.

G. B. Findley, for plaintiff in error.

F. M. Stevens, contra.

WINCH, J.

Error to common pleas court.

This is an action brought by the plaintiff to recover back the sum of \$129.14 paid by him to the county treasurer, under protest, as a penalty on a liquor traffic tax. A jury was waived by agreement of the parties and the case was submitted to the court, resulting in judgment for the defendants.

The facts in the case are all conceded and only a question of law is involved.

Plaintiff started in the liquor traffic on October 8, 1910, without first having paid an assessment as provided by law. On October 21, the county auditor entered on the duplicate against him a liquor assessment in the sum of \$620.88, being the proportionate amount due under the law from October 8, 1910, to the end of the assessment year in May, 1911, together with a 20 per cent. penalty thereon amounting to \$124.18, and a collection fee or 4 per cent. on both amounts, in all \$774.86. The county treasurer immediately demanded payment of this amount, and plaintiff not paying promptly, the treasurer seized and distrained plaintiff's goods and chattels and threatened to sell the same as upon execution and apply the proceeds of such sale to the payment of said assessment.

The next day, October 22, 1910, plaintiff filed an affidavit of discontinuance of the liquor traffic, so-called, which entitled him to a rebate of \$420.88 for the unexpired portion of the assessment year, and to save his goods from sale, paid under protest the sum of \$353.98, which includes said 20 per cent. penalty amounting to \$124.18, the only amount now in dispute.

1916.]

Lorain County.

He claims that there was no authority for the assessment of a 20 per cent. penalty under the law as it now stands.

That before the enactment of the General Code in February, 1910, the plaintiff would have been liable for the penalty in question there seems no question; the point is conceded.

The statutes then existing are found in Bates' R. S. (6th Ed.), Sections 4364-9 to 4364-13 inclusive, originally enacted May 14, 1886 (83 O. L., 157). That law had several sections, the first providing for a tax on the liquor business; the second that the tax shall be a lien and fixing the time for its payment; the third providing for the refunding of part of the tax, if the business is discontinued; the fourth, collection of tax in case of non-payment, and the fifth providing for assessors' returns and certain penalties. The concluding sentence of this section reads as follows:

And if any assessment aforesaid shall not be paid when due, there shall be added a penalty thereto of 20 per centum, which shall be collected therewith.

Manifestly the word "aforesaid" referred to any assessment provided for in the fifth or any preceding section of the act, and it was so held in the case of *Simpson v. Serviss*, 3 C. C., 433.

The code commission chopped up these sections into smaller parts and we now find said Section 5 of the original act in General Code 6081 and 6082. General Code 6081 provides that each assessor shall return to the county auditor a statement as to each place within his jurisdiction where the liquor business is conducted, showing the name of the person, corporation or co-partnership engaged therein, signed and verified before the assessor by such person, etc.

General Code 6082 reads:

"If such person, corporation or co-partnership, on demand, refuses or fails to furnish the requisite information for the statement, or to sign or verify it, such fact shall be returned by the assessor, and thereupon the assessment on said business shall be fifteen hundred dollars. If such assessment is not paid when due, there shall be added a penalty thereto of twenty per cent. which shall be collected therewith."

The treasurer claims his 20 per cent. penalty under the last sentence of this section. There is no other section authorizing it. He claims that although this sentence, by the use of the words "such assessment" clearly indicated the assessment of \$1,500 in case the trafficker refuses or fails to furnish the requisite information for the assessor's statement, still it must be construed to read, "any assessment in this chapter mentioned," or "any assessment aforesaid" as in the original law.

That such can not be the construction to be put upon the law appears from the fact that in General Code 6076, preceding, a penalty of 50 per cent. is provided in case a railroad company fails to pay assessments on its liquor traffic in buffet or dining cars.

Whether the Legislature intentionally or unintentionally changed the law as to penalties in cases like the one here before us when it enacted the General Code, is immaterial. All laws assessing taxes and assessments are to be strictly construed, and here is a law not only assessing a tax, but providing a penalty for failure to pay it on a specified day, to-wit, the day when the trafficker starts his business—if after the beginning of the assessment year.

Construing this statute, not strictly, in a sense, but literally, according to the ordinary meaning of the words used, the plaintiff was not liable to a penalty on his assessment.

We do not feel required to read into this statute some other meaning than its language intends. If the Legislature has made a mistake in enacting it, and did not intend the consequences necessarily following from the change in wording of the law on this subject, it can easily remedy its mistake and correct the law. Until it does so, we hold that the 20 per cent. penalty can not be assessed in a case of this kind.

Judgment reversed, and the facts of the case being conceded, judgment is rendered for plaintiff in error.

MARVIN, J., and HENRY, J., concur.

1916.]

Hamilton County.

**DAMAGES FOR BREACH OF CONTRACT TO PURCHASE
REAL ESTATE.**

Court of Appeals for Hamilton County.

**HENRY EISENSTADT AND THEODORE FINKELMAN v. JOHN H.
LUCKE AND JULIUS FLEISCHMANN.***

Decided, December 20, 1915.

*Refusal to Take Property as Per Contract—Measure of Damages for
the Breach—Necessary Parties—Tender of a Deed Not Required,
When—Evidence Showing Title.*

1. Where a contract for the sale of real estate runs in favor of persons to whom the proposed grantor is indebted, they are proper and necessary parties to an action for damages on account of failure of the defendant to take the property.
2. The measure of damages in such a case is the difference between the contract price and the market price at the time of the breach, and it is error to admit evidence as to what the property brought when offered at public auction at a later date and upon different terms.
3. Perfect title in the plaintiff is not shown by admission in evidence of a deed from the immediate grantor to plaintiff's creditor with a declaration of trust by the creditor in his favor.
4. A tender of a deed is unnecessary where the defendant has declared that under no circumstances does he intend to comply with the contract to purchase, and the plaintiff has made evident that he was ready and willing to perform his part of the contract.
5. It is prejudicial to the defendant in such a case to exclude a deed from the plaintiff to a third party for the property in question, which deed was executed prior to the breach but was not recorded for some time thereafter.

D. S. Oliver, for plaintiff in error.*Kramer & Bettman, Alfred Bettman and John D. Ellis,*
contra.

*Reversing *Lucke et al v. Eisenstadt et al*, 17 N.P.(N.S.), 209.

GORMAN, J.

In the Superior Court of Cincinnati the defendants in error commenced an action against plaintiffs in error to recover damages for the alleged breach of a contract for the sale of real estate. On a trial had to a jury a verdict was returned in favor of the plaintiffs below, and a judgment rendered thereon. Plaintiffs in error ask for a reversal of that judgment, claiming that several errors are disclosed in the record, prejudicial to them.

It is urged that inasmuch as Mr. Fleischmann, who held the legal title to the property contracted to be sold, had no interest in the damages which might be awarded in the action, therefore he was not a necessary or proper party plaintiff. The record discloses that Mr. Fleischmann held the legal title to the property in trust, to secure the Market National Bank on account of a debt owing by John H. Lucke to the bank, and that he was also trustee for Lucke of the equity which Lucke had in the property after the claim of the Market National Bank should be satisfied.

The contract to sell the property ran in favor of both Lucke and Fleischmann, trustee, and therefore Fleischmann and Lucke were necessary and proper parties. The fact that neither the Market National Bank nor Fleischmann, its trustee, would receive any part of the damages, if any should be awarded, was a matter between Lucke and Fleischmann, trustee, and was no concern of the defendants.

The contract for sale obligated the plaintiffs Lucke and Fleischmann, trustee, to convey a perfect title. The only title proved was the offer and admission of a deed from the immediate grantor of Mr. Fleischmann, Elmer and Jessie Britney, and a written declaration of trust by Mr. Fleischmann in favor of Lucke.

We are of the opinion that this proof was insufficient to establish a perfect title in Fleischmann and Lucke, under the rule laid down in *Walch v. Barton*, 24 O. S., 28 Syl. 2:

“When a vendor of land having contracted to convey a perfect title, brings his action to compel specific performance against the

1916.]

Hamilton County.

vendee, who denies the sufficiency of the vendor's title, the burden of showing title in himself rests on the plaintiff, and the introduction of a deed of recent date executed to himself, without further proof of title, is not sufficient."

We see no good reason why the above rule, applied in a case of specific performance, should not be applied in an action for damages. In order to recover damages the plaintiff must prove that he has a perfect title or the defendant will not be required to respond. In a case of specific performance he must establish a perfect title in order to have a decree compelling the defendant to perform specifically. If he fails in his proof in the former case as to his perfect title, we apprehend that the rule of proof should not be more lax because he seeks redress in a court of law, rather than in equity, the forum of conscience.

It is not alleged, nor is it proven, that a deed was tendered to defendants before the commencement of the action. It is alleged and shown by the record that defendants were notified, both orally and in writing, that the plaintiffs were ready and willing to deliver a deed, but the defendants refused to accept it, repudiated the contract and refused to be bound by it. Under such a state of facts it would seem that the rule laid down in *Breuing Co. v. Maxwell*, 78 O. S., 54, would apply and excuse the plaintiffs from making a tender of a deed. When the party to whom the conveyance is to be made repudiates the contract and makes it certain that under no circumstances does he intend to comply with his part of the contract, a showing of readiness and ability on the part of the complaining party to perform his part, communicated to the other party is a sufficient compliance without an actual tender. While this rule was laid down in an equity case for specific performance, it appears to be a sound rule to apply in a case at law, such as the instant case. Plaintiff should not be required to do a vain and useless act—a tender of a deed to one who has declared that he will not accept it.

It was error to admit evidence of the price received on the sale of the property at public auction, because the terms and conditions upon which the property was sold were different from those

contained in the contract of sale with the defendants, and as the price received might have been, and no doubt was, in some measure affected by the terms, that sale would not reflect the market value of the property. The measure of damages was the difference between the contract price and the market price at the time of the breach of the contract. This sale was made some time after the alleged breach.

Defendants offered in evidence a deed for this property from Julius Fleischmann to Gustave R. Fries, dated, attested and acknowledged six months prior to the date of the contract claimed to have been breached. The deed was not recorded until more than three months after the date of the contract. The court excluded this deed on the ground that the defendants failed to show that the deed had been delivered to Fries before the execution of the contract of sale. The trial court stated to counsel for defendants that, if he would show a delivery of the deed before the date of the contract, he would admit the deed in evidence. This, counsel for defendants failed to show.

In the case of *Oehler v. Walsh*, 7 C.C.(N.S.), 572, the circuit court of this county, the predecessor of this court, held that in the absence of evidence to the contrary it would be presumed that a deed was delivered on the date of its execution. See also *Devlin on Deeds*, Section 108. where it is said:

“But when the time of actual delivery is doubtful, resort must be had to presumption. And the presumption in cases of this kind, it may be stated, as a general rule, is that a deed is delivered at its date.”

The deed having been recorded in October following the date of the contract, but dated in January prior to the date of the contract, the defendants had the right to offer the deed which presumptively was delivered before the date of the contract, to-wit, on the date of its execution. This presumption, to be sure, might have been rebutted by plaintiffs showing a delivery after the date of the contract, but the burden of thus showing delivery was not upon defendants but upon plaintiffs, and if they failed to overcome the presumption in favor of defendants' contention that the deed was delivered to Fries before the date of the con-

1916.]

Lorain County.

tract, then plaintiffs must fail because at the time the contract was made for the sale of the property to defendants plaintiffs could not give title. Fries was the owner, not the plaintiffs. It was therefore prejudicial to defendants to exclude this deed as evidence that plaintiffs were unable to perform at the time of the alleged breach.

It was not error to admit evidence of the contents of the contract of sale, when it was shown that the original contract had been destroyed by fire, although it was in existence when the action was commenced; but plaintiffs should have been required by supplemental petition, before admitting this evidence, to set up the destruction of the original contract after the suit was commenced.

We find no errors in the record prejudicial to plaintiffs in error except those herein pointed out; but on account of those errors noted, the judgment will be reversed and the cause remanded for a new trial.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

**ORDERS AFFECTING THE CUSTODY OF CHILDREN
APPEALABLE.**

Court of Appeals for Lorain County.

BENJAMIN F. VARSEY V. LILLIAN VARSEY.

Decided, March 20, 1916.

Appeal—May be Had in a Divorce Proceeding—From an Order Affecting the Custody of Minor Children—Exception Contained in Section 12002 Enlarged under the New Constitution.

Jurisdiction as to the custody of children is inherently equitable in its nature, and is given to the court of appeals under the section of the Constitution establishing that court; and it follows that appeal lies from an order in a divorce proceeding affecting the custody of minor children, notwithstanding the contrary provision of Section 12002, General Code.

C. G. Washburn, for plaintiff.

David Perris and Wm. G. Stuber, contra.

CARPENTER, J.

The defendant has appealed this case to this court so far as the decree of the court of common pleas relates to the custody of Russell Albert Varsey, minor child of plaintiff and defendant.

The question before this court arises out of the motion of the plaintiff to dismiss the appeal, for the reason that this court has no jurisdiction to entertain the same, by reason of its not being appealable under the provision of Article IV, Section 6, of the Constitution, establishing the court of appeals.

It is provided therein that courts of appeals have appellate jurisdiction in the trial of chancery cases. It will be observed that Section 12002, General Code, provides that no appeal will be allowed from a judgment or order of the common pleas court in a divorce case, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony, or where an injunction has been granted under Section 12001.

Section 8033 provides:

“Upon hearing the testimony of either or both of such parents, * * * the court shall decide which one of them shall have the care, custody and control of such offspring.”

Section 8035 provides:

“An appeal to a higher court may be had upon appellant giving bond * * * .”

In the case of *Bower v. Bower*, 90 Ohio St., 172, the syllabus reads as follows:

“An appeal will lie from a judgment or order of a court for the care, custody and maintenance of minor children regardless of whether such order is made in an action for divorce, divorce and alimony or alimony only, or in proceedings under the provisions of Section 8032, General Code.”

Notwithstanding the court in the foregoing case bases the right of appeal upon statutory grounds, yet it is somewhat suggestive of the legal characterism pertaining to the custody of children by the courts. In the case of *Rogers v. Rogers*, 51

1916.]

Lorain County.

Ohio St., 1, Judge Spear in his opinion speaks of the authority of a court over the matter of custody of children in divorce proceedings as probably being inherent, but it is given by the divorce statute. And the court in the memorandum opinion in the Bowers case speaks of jurisdiction in such matters as being "incident to the suit." If this right adhered to the court by reason of being an inherent right, is it not quite suggestive that the statute was a mere codification of that right?

It does not follow that where a class of cases is within the jurisdiction of chancery, that jurisdiction in chancery is taken away because courts of law subsequently give a remedy. *Cram v. Green*, 6 Ohio, 429. Accordingly, our Supreme Court has held that notwithstanding partition proceedings are regulated by statute in Ohio, yet they are inherently chancery cases, having been so classed by the courts of England, and are therefore appealable to the courts of appeals.

In the case of *Sullivan v. Thomas*, 3 S. C., 531, the court in its syllabus says:

"By the term, cases in chancery, as used in Article IV, Section 4 of the Constitution, declaring the jurisdiction of the Supreme Court, is meant such cases as were cognizable by the courts of equity of the state existing at the time of the adoption of the Constitution."

In the opinion the court says:

"It must be premised that the jurisdiction of this court, so far as it was ascertained and fixed by the Constitution is unaffected by the provision of the code of procedure or any other statutory law. Again, the terms employed to mark out that jurisdiction must be taken in the sense in which they were understood at the time the Constitution was adopted. Thus, for instance, the term 'cases in chancery' at the time, meant cases of a class of which the court of chancery could entertain jurisdiction although since that time the court of chancery has been abolished and its jurisdiction conferred upon the court of common pleas. Yet, what was intended to be described as 'cases in chancery' must be determined now, not with reference to the present statute of jurisdiction and forms of procedure, but by the inquiry whether any given case could have been regarded,

at the adoption of the Constitution, as a 'case of chancery.' When the nature of the right in controversy, or of the relief sought in any case is such that, prior to the code, it would have been appropriately pursued in the court of chancery, it will be regarded as within the expression 'cases of chancery.'

"The circumstance that forms of proceedings, as it regards law and equity, are assimilated under the code, does not affect the jurisdiction of the court as established under the Constitution; but we look to the substantial character of the controversy before us for the purpose of ascertaining the extent of the powers in relation to such case, rather than to the nature of the court from which the case comes or the technical mould in which the case is cast."

That divorce and alimony cases were not recognizable in the court of chancery in England, is verified by the following excerpt from the opinion in the case of *DeWitt v. DeWitt*, 67 Ohio St., 340, 344:

"We gather from a somewhat extended examination of authorities that, in so far as we derive any common law rules respecting divorce and alimony from the mother country, we inherited those administered in the ecclesiastical courts, for, outside of parliament, no other tribunal had or assumed cognizance of such controversies. Such power did not, in England, belong to a court of equity. The ecclesiastical court was not, and never had been, a court of equity. It was a canonical court, and never deviated from the canon law. * * * 'The court for divorce and matrimonial causes owes its jurisdiction—in part original and in part derived from ecclesiastical courts—to the act of parliament by which it was created, and the several amending acts by which that jurisdiction has been in various ways altered and amplified.' * * * It may be fairly claimed, from the foregoing, that the courts of Ohio have not general equity jurisdiction in suits for alimony, but that the jurisdiction is such, and such only, as is given by the statute." * * *

It will be noticed that in the entire opinion no mention is made regarding the custody of children, and it is quite suggestive that the Legislature deemed it proper to enact a separate statute, as it were, to avoid confusion in the administration of justice. Having demonstrated by authority that divorce and

1916.]

Lorain County.

alimony were not matters in chancery, it yet remains to determine whether the custody of children was in fact recognizable in courts of chancery. That that was so we find in 9 Eng. & Am. Enc. Law, 866:

“The ecclesiastical courts had no power to determine the custody of the children, as at common law the court of chancery has jurisdiction in such cases. Where jurisdiction to grant divorce is conferred upon a common-law court, such court will have only such powers as to the custody of the children as are conferred by the divorce statute. But where the jurisdiction is conferred upon a chancery court it will have full power to fix the custody of the children, aside from the special provisions of the statute.

“On granting a divorce it is the duty of the court to protect the interest of the state by providing for the custody and support of the children, and this may be done although neither party has prayed for such relief.

“The statutes in the various states of the United States and in England give the courts power to provide for the custody and maintenance of the children of the parties pending the suit for divorce.

“Courts having chancery jurisdiction may make such orders by virtue of the general jurisdiction in equity although the statutes are silent as to such remedy or merely provide that the custody may be awarded after a divorce is granted.”

Again in the case of *In re Morgan*, 117 Mo., 249:

“Divorce and alimony, part of this jurisdiction, belonged to the ecclesiastical courts in former times in England, and the power to make awards as to the custody of children is a part of the ancient chancery jurisdiction.”

Counsel for plaintiff has not referred us to any decision contrary to the foregoing, and knowing his accustomed diligence in preparation of cases, we may infer that there are none.

For the foregoing reasons, and upon the authorities cited, we hold that the custody of children is inherently equitable in its nature, having such characteristics and cognizable in a court of chancery, all of which, we think, brings it within the com-

prehension of the clause "Cases in Chancery" in Article IV, Section 6 of the Constitution of this state.

The motion of the plaintiff is therefore overruled.

MEALS, J., and GRANT, J., concur.

**RENTAL NOT RECOVERABLE UNDER A LEASE
IMPERFECTLY EXECUTED.**

Court of Appeals for Hamilton County.

**THE H. S. HAMBERGER COMPANY V. MILLER BROTHERS &
COMPANY.***

Decided, February 1, 1916.

*Assignment of Lease Within the Statute of Frauds—Parol Testimony
as to Modification of Terms of the Lease which it is Sought to
Transfer Not Admissible—Tender of an Imperfectly Executed
Lease Does Not Constitute Performance.*

1. The assignment, not yet performed, of a written lease of real property is within the statute of frauds, and oral evidence of a modification of the terms of the transfer is inadmissible in an action for rental under the lease.
2. The assignment of a lease is as necessary to performance of a contract to transfer as is delivery of possession of the property, and performance can not be claimed where an imperfect assignment was the only one proffered.

Murray Seasingood and Robert P. Goldman, for plaintiff in error.

Alfred B. Benedict, contra.

JONES (Oliver B.), J.

This action is for the recovery of one-half month's rent from June 15 to July 1, 1914, and for a proportionate share, for the same period, of an annual bonus for the transfer of a lease of the premises at 624 to 628 Race street, Cincinnati, made by

*Motion to require the Court of Appeals to certify its record overruled by the Supreme Court, April 25, 1916.

1916.]

Hamilton County.

Mary T. Harrison and others to H. S. Hamberger and formerly occupied by the H. S. Hamberger Company and assigned by it under the terms of a written option to Miller Brothers & Company, who now occupy these premises. This option was accepted in writing May 15, 1914. The written agreement made by this option and its acceptance provided that plaintiff might vacate said premises any time within thirty days from its acceptance, with privilege of further time up to thirty days more, and assign the lease and turn over possession of the building.

At the close of plaintiff's evidence the court instructed a verdict for defendant and rendered judgment thereon. Plaintiff prosecutes error to this court.

The petition alleges that the lease was duly assigned by H. S. Hamberger to plaintiff, the H. S. Hamberger Company, and by it duly assigned to defendant, and tendered to defendant on June 13, 1914, and again on June 15, 1914. These allegations are denied by the answer. Plaintiff, however, admits that a small part of the leased premises were occupied by its sub-tenant, one Kamp, who carried on a cigar stand therein, renting from month to month and remaining in possession until July 1, 1914. But in the petition plaintiff pleads the original contract was by agreement of the parties modified so that plaintiff agreed to give up possession on June 15, 1914, of all said premises except that part occupied by Kamp and defendant agreed to so accept possession of the premises subject to such occupation by Kamp; and it was alleged that this modified agreement was duly performed. Defendant in the answer denied this modification of the contract, and denies that it took possession of the premises June 15, 1914, with Kamp still in possession of said cigar stand therein.

It developed on the trial that plaintiff relied solely upon oral evidence to prove this alleged modification of the written contract. After some evidence tending to show such modification had been submitted, the trial judge ordered stricken out of the record all evidence relating to such oral modification, and refused to permit plaintiff to prove such modification by further evidence. Plaintiff excepted to this ruling of the trial judge, and complains of it here as the principal error relied upon.

What is called the fourth section of the statute of frauds is now found in Section 8621, General Code, as follows:

“No action shall be brought whereby to charge the defendant * * * upon a contract or sale of lands, tenements or hereditaments, or interest in, or concerning them; * * * unless the agreement upon which such action is brought or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.”

Kling v. Bordner, 65 O. S., 86, holds that the written memorandum of agreement required by the statute is not sufficient, unless it contains the essential terms of the agreement expressed with such clearness and certainty in the writing itself, or other writings to which it may refer, that the contract can be established without the necessity of resorting to parol proof.

Clark v. Guest, 54 O. S., 298, also decides this question squarely. Its syllabus closes as follows:

“A verbal extension of the time within which to take off such timber is within the statute of frauds, and to be valid must be in writing; that such verbal extension of time, reliance thereon, and consequent delay in taking off such timber, is not such fraud as will take the case out of the statute.”

Judge Burket, on pages 306 and 307, uses this language:

“The circuit court found as its conclusion of law upon the facts found, that it would be a fraud upon the defendant in error to revoke such verbal extension of time; and that the case was therefore taken out of the statute of frauds. This is not tenable. The statute was enacted to prevent frauds and perjuries. The law-making power knew that frauds and perjuries would be practiced with or without the statute, but it was thought that less harm would come from enacting and enforcing the statute, than otherwise. The only exceptions to the statute, engrafted therein by judicial interpretation, if not by judicial legislation, that can be justly defended, are cases in which the acts of both parties are such as to imply a contract with substantially the same certainty as would be shown by a written memorandum, as in the case of a verbal sale of lands followed by a delivery of possession to the purchaser, and valuable permanent improvements made by him with the knowledge of the vendor.

1916.]

Hamilton County.

“To say that to refuse to carry out a verbal purchase of standing growing trees is a fraud on part of the owner of the trees, is to disregard the statute, and in effect a repeal thereof. * * * He had no legal right to rely upon the verbal contract, and where there is no right there can be no fraud. If he intended to rely upon the extension of time he should have caused the contract therefor to be reduced to writing. The statute was enacted to protect men in their property rights and it should be enforced unless in cases clearly within some of the well established exceptions.”

· *Broom's Legal Maxims*, 8th Edition, star page 888, states the rule thus:

“Where a contract is required to be in writing by the statute law, it clearly can not be varied by any subsequent verbal agreement between the parties; for, if this were permitted, the intention of the Legislature would be altogether defeated. A contract, for instance, falling within the fourth section of the statute of frauds, can not be waived and abandoned in part; for the object of the statute was to exclude all oral evidence as to contracts for the sale of land; and, therefore, any contract sought to be enforced must be proved by writing only; and if such a contract could be verbally waived in part, the new contract between the parties would be proved partly by the former written agreement and partly by the new verbal agreement. And this reasoning applies also to a contract for the sale of goods falling within the operation of the seventeenth section of the same statute. Such a contract can not be varied or altered by a subsequent verbal agreement.”

See also, *Burdick on Sales*, 35; *Benjamin on Sales* (6th Ed.), Section 216; and the leading case of *Goss v. Lord Nugent*, 5 B. and Ad., 58.

Brown on the Statute of Frauds thus states the rule in Section 411:

“It seems to be well established that where a contract, affected by the statute, has been put in writing, and the plaintiff, in a case of subsequent oral variation of some of the terms of the written agreement, declares upon the writing qualified by the oral variation, he can not prevail. The decision in *Cuff v. Penn*, one of the earliest and most important cases of this class, was in fact to the contrary; but from the report the point does not seem to have been distinctly in the mind of the court, the

whole stress of the opinion bearing upon another position; and later English and American authorities have conclusively settled the rule as above laid down."

The court was therefore right in holding that this contract which was within the statute of frauds could not be varied by parol.

Nor does the case of *Negley v. Jeffers*, 28 O. S., 90, relied upon by plaintiff, hold otherwise. In that case the deed to the real estate had been executed and the title passed and subsequently a modification in the manner of payments made by parol was sustained, the court distinctly holding that such a contract was not within the statute of frauds. (Syl. 6, 7 and 8.) This case was so understood and cited in the note to Section 421 of Browne on Statute of Frauds.

A written contract for the sale of land, where possession has not been delivered, may be rescinded by an oral agreement (*Jones v. Booth*, 38 O. S., 405). Such rescission can be proved by parol. So, of course, can complete performance of such a written contract. Likewise, the plaintiff may always show a substituted performance instead of that required by the original contract, when that performance has been actually and fully had and has been accepted by the other party in full substitution for such original terms, but it does not permit proof that such written contract is to be varied by parol where it is not yet performed.

This doctrine of substituted performance is stated in Browne on Statute of Frauds, Section 423, as follows:

" * * * performance, according to the orally substituted terms, is available to either party in like manner as would have been performance, according to the original contract. This is manifestly not to enforce an oral agreement within the statute of frauds, even by way of defense; the oral stipulation is relied upon simply by way of accord and satisfaction; it is relied upon for the purpose of proving performance alone, which is thus, so to speak, dissociated from the contract itself. And in this sense and for this purpose, there is no difficulty in accepting the distinction asserted between the contract which is within the purview of the statute, and the performance, which is not."

1916.]

Hamilton County.

Leading cases on substituted performance are found in *Leather-Cloth Co. v. Hieronimus*, L. R., 10 Q. B., 140; *Swayne v. Seamans*, 9 Wall. (U. S.), 254.

If defendant could be shown to have accepted the lease and actually taken possession of the premises on June 15 with Kamp still in, as a substituted performance of this contract, plaintiff might recover.

The position of the plaintiff, however, is somewhat equivocal. After alleging in the petition the fact that Kamp occupied part of the premises with his cigar stand during the month of June and that defendant agreed thereto, plaintiff says:

“The defendant refused to accept tender of the key and assignment of the lease made as aforesaid June 13, 1914, and again June 15, 1914, but nevertheless took possession of said premises on June 15, 1914, and has been in occupation of the same ever since.”

And again:

“The defendant further claims not to have taken possession of said premises until July 1, 1914.”

Plaintiff undertook to show by evidence that certain acts of Mr. Fanning, defendant's general sales manager, and of Mr. Hobelman, his window trimmer and utility man, operated as a taking of possession of the premises by defendant or at least tended in that direction so far as to require a submission to the jury.

It must be conceded, though, in the first place, that there is nothing in the evidence to show the authority of either of these men to act for or to bind defendant as his agent in this matter under the rule laid down in *Bradford Belting Co. v. Gibson*, 68 O. S., 442.

The evidence shows without dispute that Mr. Grote, who furnished men and teams for the purpose, moved out from the premises shelving, piping and other things for plaintiff and was so engaged until at least June 20th; that Fanning and Hobelman acted for defendant in the matter only so far as to see that none of the tables, chairs and other chattel property which plaintiff

had sold to defendant and which remained in the premises, were taken, and that such other movables and fixtures as did not belong to the building were not left to be in the way of defendant. The painting of plaintiff's removal sign by Hobelman and the taking of it down, had nothing to do with the case. Nor do we find in the record any evidence tending to show that defendant went into possession of the premises before July first. In fact, it rather appears that plaintiff does not really claim that defendant actually took possession of the premises on June 15, with Kamp still in possession of the cigar stand, but rather that after Fanning had misled plaintiff into believing he would do so and thus caused him to sacrifice his property by a hurried sale, because of a carpenters' strike or for some other reason, defendant refused to carry out his oral contract and did not take possession until July 1st.

But an assignment of title was as essential to performance as delivery of possession. It is admitted defendant did not receive an assignment of the lease before that date. True, an assignment was executed by plaintiff June 13, 1914, and tendered to defendant on that day, and also on June 15, 1914; but that assignment was executed by the H. S. Hamberger Company, while the lease was made by H. S. Hamberger. There had been an agreement by H. S. Hamberger to convey same to the H. S. Hamberger Company, which was shown by the minutes of that company. But until that agreement had been carried out and the assignment duly executed, defendant was justified in refusing to accept the proffered transfer to him from the company as it would not confer a complete legal title.

A careful consideration of the record fails to disclose any error to the prejudice of plaintiff, and the judgment is therefore affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

1916.]

Hamilton County.

**STATUS UNDER THE CIVIL SERVICE OF A MUNICIPAL
EMPLOYEE APPOINTED TEMPORARILY
IN 1912.**

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF GERHARD FISCHER, v.
PHILIP FOSDICK, DIRECTOR OF PUBLIC SERVICE OF THE
CITY OF CINCINNATI.

Decided, May 8, 1916.

Civil Service—Service of a Temporary Employee in the Municipal Service—Not Automatically Dispensed with by the Filing of an Eligible List, When—No Rights Waived by Taking a Competitive Examination, When—No Prejudice Arises from Failure to File an Explanation—Section 4488.

One who was given a temporary appointment to the municipal service during the year 1912 and prior to the furnishing of an eligible list by the civil service commission, was an incumbent at the time the civil service law of 1913 went into effect, and was entitled to hold his position until he failed to qualify therefore or was discharged for cause.

Moulinier, Bettman & Hunt, for relator.

Charles A. Groom, City Solicitor, and *Saul Zielonka*, Assistant City Solicitor, contra.

GORMAN, J.

The relator, Gerhard Fischer, avers in his amended petition that on the 16th day of May, 1912, the mayor of the city of Cincinnati, to prevent the stoppage of public business, appointed him temporarily to the position of machinist of the filtration plant of the subdepartment of waterworks in the city of Cincinnati; that he continuously occupied said position and performed the duties thereof up to and including November 9, 1914; that his occupancy of said position and the performance of the duties thereof were in accordance with and in pursuance of the orders of the director of public service of the city of Cincinnati

duly issued and made in the course of the management by that director of said waterworks; that at the time he was appointed to said position the same was and has ever since been and is now in the classified service of said city; that no examination for said position, competitive or non-competitive, was ever held or given by the civil service commission of said city until the 11th day of September, 1914; that on said day a competitive examination was held for all the positions of machinists of the subdepartment of waterworks of said department of public service, such examination covering the said position occupied by the relator as well as many other positions of machinists in said waterworks; that the relator took and passed said competitive examination; that the civil service commission of the said city has never held or fixed any time for a non-competitive examination for relator of said position; that about November 6, 1914, an eligible list for the positions of machinists in said subdepartment of waterworks was made up by said civil service commission from the list of those who passed said examination; that on the 6th day of November, 1914, the said Philip Fosdick, then director of public service, issued and furnished relator with a copy of a pretended order of discharge to be effective November 9, 1914, containing as the exclusive and sole reason for the same the following: "for the reason he is a temporary appointee and civil service commission now has an eligible list;" that the eligible list referred to is the eligible list produced as the result of said examination of September 11, 1914; that since the 9th day of November, 1914, said Fosdick as director of public service, and his successor, Charles F. Hornberger, has refused to recognize relator as the occupant and incumbent of said position, and has refused to assign relator any work in said position or to permit him to do any work in said position, but has made an appointment of another person in place and stead of relator to perform the work of said position; that the director of public safety is the appointing officer of said position, and that at the time relator was laid off or discharged as aforesaid said director of public safety did not furnish relator with a copy of an order of discharge, lay-off, reduction or sus-

1916.]

Hamilton County.

pension, or with any reasons for the same except the above-named order and reasons of November 6, 1914. Relator prays that a writ of mandamus may issue ordering the director of public safety to recognize the relator as, from and after November 9, 1914, the incumbent and occupant of said position of machinist at the filtration plant at the waterworks.

To this amended petition of relator an answer was filed admitting most of the allegations of the petition; and admitting especially that the defendant, the director of public safety, issued and furnished relator with a copy of an order of discharge to be effective November 9, 1914, containing as the sole and exclusive reason for the same the following: "for the reason that he is a temporary appointee and civil service commission now has an eligible list," the same reason set forth in relator's petition. The defendant further says that relator on August 29, 1914, made application for competitive examination for the position of machinist in the division of waterworks of the department of public service, pursuant to the ordering of and advertising same by the civil service commission of the city; that said examination was conducted according to law; and that relator pursuant to his application for admission to said examination appeared and took the same and received an average of seventy-one per cent., and the rank of nineteenth on the eligible list, which was approved and posted September 25, 1914, as required by the statutes and rules of the civil service commission in such case made and provided; that on November 7, 1914, relator was served with personal written notice that he was discharged for the reason that he was a temporary appointee and the civil service commission then had an eligible list and that his discharge would be effective November 9, 1914, at five o'clock P. M., and that he might make and file his explanation with the director of public service. Defendant further avers that the eligible list referred to in said order and reasons for discharge was the eligible list produced as a result of the examination held September 11, 1914, at which relator competed. The defendant further avers that the relator has not made or filed any explanation whatsoever. Defendant further avers in his answer that on

November 6, 1914, a regular requisition to fill the vacancy in the position formerly held temporarily by relator was made by the director of public service as required by the statutes in such case made and provided, and three names from said list having higher grades and averages than the relator certified by the civil service commission from the eligible list for the position formerly held temporarily by relator, and from said eligible list and certification of the civil service commission of three persons qualified therefor the said director of public service made an appointment to fill the vacancy on November 10, 1914, as required by the statutes in such case made and provided. The defendant further says that in March, 1912, the said civil service commission by a unanimous vote of the members of said commission in regular meeting adopted rules and regulations, among which is Rule 74, reading as follows:

“74. A temporary appointment to prevent the stoppage of public business or to meet extraordinary exigencies shall continue only until such time as the commission can certify persons from an appropriate eligible list to fill the vacancy.”

Defendant therefore prays that the petition and the amended petition be dismissed.

A demurrer has been filed to this answer for the reason that the allegations thereof are not sufficient in law to constitute a defense.

A demurrer was filed to the answer to the original petition, and came on to be heard before Judges Spence and Pollock while they were sitting as judges in this district. And upon arguments and presentation of the law those judges found that the demurrer searched the record, and that the petition was insufficient in law and therefore sustained a demurrer to the petition and gave relator leave to file an amended petition, which was accordingly done. In the amended petition relator has sought to meet some of the objections made by the visiting court in sustaining the demurrer to the petition.

The first question to be determined is whether or not Fischer was legally removed or separated from his position or appointment. At the time this temporary appointment was made in

1916.]

Hamilton County.

1912 many places in the city service were not in the classified list. Under the provisions of Section 4488, General Code, as it existed when Fischer was appointed, there was no eligible list from which an appointment could be made because the civil service commission had not held an examination and furnished such a list, and under the section above cited the appointing power was authorized to make a temporary appointment.

In 1913 the civil service law was amended so as to bring within its protection very many persons who previous to the adoption of the law were not on the eligible list. Under the law of 1913 (103 O. L., 703), it was provided, among other things, in Section 10, that:

“The incumbents of all offices and places in the competitive classified service, except those holding their positions under existing civil service laws, shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing in the service. Reasonable notice of all such non-competitive examinations shall be given in such manner as the commission may require, and all such non-competitive examinations shall conform in character to those of the competitive service.”

As has been stated, when Fischer was appointed there was no eligible list, and during the time that he occupied the position down to September, 1914, the civil service commission had failed to conduct a non-competitive examination or to give him an opportunity to submit to such an examination. The question presented is whether or not he was an incumbent of his place at the time the civil service law of 1913 went into effect? He was entitled to hold his position until he had been given an opportunity to take a non-competitive examination. It was not his fault that he did not take such examination but it was the fault, if any, of the civil service commission of the city.

We are of the opinion that the proper construction to be placed on Section 10, of the law of 1913, is that Fischer was an incumbent of the place he occupied at the time this law went into effect, and as such he was protected by the civil service law and entitled to hold his position until he failed by either

a competitive or a non-competitive examination. In view of the fact that the character of the non-competitive examination shall be the same as that of the competitive examination, we see no reason why Fischer, when he passed the examination in 1914, although that was a competitive examination, should not be entitled to hold as though he had passed a non-competitive examination.

By the provisions of Section 17 of the civil service law of 1913:

“No person shall be discharged from the classified service * * * laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay-off * * * or suspension * * * whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off * * * or suspended with a copy of the orders of discharge, lay-off * * * or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation.”

Under the civil service law of 1913, as we read it, there were two classes of incumbents: those who had been appointed under the civil service law theretofore existing, who had taken the examination or who had otherwise been appointed in conformity to the law; and those who had been appointed without an examination as temporary appointments. Section 10, of the law of 1913, requires all those persons who had been temporarily appointed, as a condition of their continuance in the service, to take a non-competitive examination which should be of the same character as a competitive examination; all those persons who were in classified service who had taken an examination under the civil service law as it existed prior to the law of 1913 were protected and not required to take another examination. There were two classes of incumbents—those who had been appointed without an examination, and those who held by virtue of an examination taken under a previous civil service law.

In our opinion, therefore, Fisher was entitled to hold his place until he failed to pass a competitive or non-competitive examination, or unless he was discharged for some cause or reason.

1916.]

Hamilton County.

The Moores-Barnes law was passed and became effective September 1, 1915, about ten months after the discharge of Fischer and after this suit was commenced. Under this law no person is entitled to hold his place unless he has submitted to and passed a competitive examination, or unless he had been in the public service for at least seven years. When this law went into effect Fischer could have been discharged, because it is admitted that he had not been in the service for seven years, nor had he passed successfully, as one of the three highest a competitive examination. But at the time Fischer was discharged or released from the service the Moores-Barnes law was not in effect and that law can not be invoked, in our opinion, to aid the defendant in his action in discharging Fischer.

It is claimed that by taking the competitive examination in 1914, Fischer waived his right to have the non-competitive examination. This court is of the opinion that Fischer did not waive his right to hold the position, by taking a competitive examination. A person who is in the service, and who has been duly appointed after taking a successful examination, may nevertheless take a competitive examination for any position in the city service without waiving his right to hold his place or position.

Non constat but Fischer when he took a competitive examination was anxious to learn whether or not he would be eligible to appointment to some other place or position than that which he held in the city service. He was given no option to take a non-competitive examination or a competitive examination, and therefore we are unable to see how he waived any right when the option was not given him to take a non-competitive examination.

Further, it is claimed that by failing to give an explanation after he was released from the public service he is not entitled to maintain this action. No explanation which Fischer could give would affect his case. He was not removed from the service or discharged because of any conduct on his part, but because of the construction placed on the law of 1913 by the director of public service. His construction of the law was that as soon as an eligible list was furnished for the position which Fischer

occupied he thereby automatically ceased to hold his temporary position, notwithstanding the fact that he had not been given an opportunity to take a non-competitive examination. The construction placed upon the law of 1913 by the director of public service was that Fisher was not an incumbent of the office within the meaning of the law at the time the law of 1913 became effective. In this construction the court is not in accord with the director of public service. As has been stated above, we are of the opinion that he was an incumbent at the time the law of 1913 went into effect, and was entitled to the protection afforded him by that law.

The defendant further sets up the rule of the civil service commission passed in 1912, to the effect that temporary appointments shall continue until there is an eligible list. This rule was adopted under the civil service law as it existed prior to the taking effect of the law of 1913. The rules of the civil service commission could only apply to the state of law as it existed when the rules were adopted, that is, the law in force prior to 1913. A rule of the civil service commission inconsistent with the law of 1913 must necessarily fall when that law became effective, and therefore the rule invoked by the defendant, in force in 1912, could not aid the defendant in ousting the relator from his position because that rule was abrogated when the civil service law of 1913 went into effect making Fischer an incumbent.

Counsel for defendant cited to us the case of *Shelvoy v. Fletcher*, 84 N. J. Law, 547, in support of his contention that Fischer was not an incumbent at the time the law of 1913 went into effect. We have read the case and the facts upon which the law of that case was enunciated, and we are unable to see how it applies to the case before us.

Upon a full consideration of the case, together with a consideration of the decision of Judges Spence and Pollock, this court has reached the conclusion that the demurrer of the relator to the answer filed to the amended petition should be sustained, as the same does not present a defense.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

1916.]

Stark County.

THE LAW OF EXTRADITION.

Court of Appeals for Stark County.

IN THE MATTER OF THE EXTRADITION OF A. W. WILLIAMS.

Decided, September Term, 1915.

Extradition—Proceedings in—Examination Before Judge—Proof—Charge of Crime in Demanding State—Duty of Governor—Section 110, General Code.

1. The Governor of this state upon a demand made in due form by the Governor of another state, for the surrender of a fugitive from justice, should first determine whether or not the requisite preliminary steps have been taken, and that legal grounds exist, and that the case falls within the purview of the statutes for issuing of an extradition warrant, and if he so finds it then becomes his duty to issue such warrant.
2. The sheriff, in the instant case, took the fugitive before the judge of the court of common pleas who under Section 114, General Code, had jurisdiction to hear and determine the cause, and upon proof by him adjudged sufficient ordered the fugitive to be delivered to the agent of the state of Pennsylvania, who was named in said requisition, to be conveyed to the state of Pennsylvania for prosecution on said charge. *Held:* That neither the Governor nor the examining judge passes upon the ultimate guilt of the accused, but upon the question as to whether or not an offense is charged under the laws of the state demanding extradition, whether or not the identity of the party charged is established, whether or not the party charged is a fugitive from justice, and that the extradition is not for the purpose of enforcing any civil liability against the accused.
3. The information upon which these proceedings were based charged the offense of obtaining money by false pretenses, and the objection to this charge being technical and the information substantially charging the offense, it is held to have been sufficient.
4. The presumption is that the Governor of Ohio found in issuing the extradition warrant that the application for the requisition was made in good faith for the purpose of having the alleged fugitive answer to the offense charged, and the court finds there is not sufficient evidence to the contrary in the record to overcome this presumption.

Amerman & Mills, for A. W. Williams.

Clarence A. Fisher and *Walter S. Ruff*, for state of Pennsylvania.

SHIELDS, J.

It appears that on the first day of July, 1915, an application was made, in due form, to the Governor of the state of Pennsylvania, by W. D. Burns, as district attorney of the county of Clarion, in said state, accompanied by a statement in writing by him and by a duly attested copy of an information charging the plaintiff in error with the crime of obtaining money under false pretenses; that the obtaining of money or property under false pretenses was an offense under the laws of said state, that the offense therein charged was committed in said state, and the plaintiff in error was then in said state, accompanied also with an affidavit of the facts constituting said alleged offense by one claiming to have actual knowledge thereof, and that the plaintiff in error was then a fugitive from justice. Whereupon the Governor of the state of Pennsylvania issued a requisition upon the Governor of the state of Ohio for the extradition of the plaintiff in error. The Governor of the state of Ohio, after an examination of the documentary and other proof submitted to him with said requisition, issued a warrant directed to the sheriff of Stark county, Ohio, commanding him to arrest the plaintiff in error and take him before a judge of the Supreme Court, or of the circuit court, or common pleas court, to be examined on said charge. Having taken him before one of the common pleas judges of said Stark county for said purpose, upon such examination and upon proof by said judge adjudged sufficient, the plaintiff in error was ordered by said judge to be delivered to the agent named in said extradition warrant to be conveyed and surrendered to the authorities in said county of Clarion, in said state of Pennsylvania, for prosecution on said charge. Thereupon a motion for a suspension of the execution of said order and judgment was made to said judge on behalf of said plaintiff in error to enable him to prosecute error to said judgment to the Court of Appeals in and for said Stark County.

1916.]

Stark County.

which said motion was allowed, and pending the suspension of said order and judgment the plaintiff in error filed a petition in error in this court to reverse the said judgment, and was admitted to bail.

The principal errors relied on are:

1. That the alleged information does not charge a crime under the laws of the state of Pennsylvania.

2. Assuming that it does charge said crime, the evidence shows that the ulterior purpose of this extradition proceeding is not to prosecute plaintiff in error for a violation of any offense committed against the laws of said state, but to compel the payment of an alleged civil liability.

In this state the statutes regulating extradition proceedings are plain and admit of no necessity for construction. The Governor of the state upon a demand made, in due form, for the surrender of a fugitive from justice, first determines whether or not the requisite preliminary steps have been taken, that legal grounds exist and that the case falls within the purview of the statutes for the issuing of an extradition warrant, and if he so finds, it then becomes his duty to issue such warrant (*Work v. Corrigan*, 34 O. S., 64), all of which appears to have been done in this case. After apprehending and arresting the plaintiff in error, it further appears that the sheriff of Stark county took the plaintiff in error before one of the judges of the court of common pleas of said county, who under the statute had jurisdiction to hear and determine the same, and who upon proof by him adjudged sufficient, ordered and adjudged that he be delivered to the agent named in said requisition, to be conveyed to the state of Pennsylvania for prosecution on said charge.

It is contended that the information upon which the right to extradite the plaintiff in error is based does not charge an offense, and therefore the Governor was without jurisdiction to issue said warrant, and that the judge hearing said charge was likewise without jurisdiction to order the plaintiff in error to be extradited. As we construe the statutes regulating extradition proceedings, neither the Governor nor the examining judge

passes upon the ultimate guilt of the accused, but, among other things, passes upon the question as to whether or not an offense is charged under the laws of the state demanding extradition, whether or not the identity of the party charged is established, whether or not the party charged is a fugitive from justice, and that the extradition of the plaintiff in error is not for the purpose of enforcing any civil liability against him, that is, that the criminal machinery of the state shall not be invoked and employed to lay a foundation for or to work out any civil remedy against the party charged. Speaking for the court in the case of *Wilcox v. Nolze*, reported in 34 O. S., 520, Judge Okey says:

“The Governor of a state, in issuing his warrant of extradition of a fugitive from justice, acts in an executive, and not in a judicial, capacity. He is not permitted to consider the question whether the accused is guilty or not guilty; he is not to regard a departure from the prescribed forms for making application, or as to the manner of charging crime, in any matter not of the substance, and he is not to be controlled by the question whether the offense is or is not a crime in his own state, the inquiry being whether the act is punishable as a crime in the demanding state. Nor have the courts larger powers in any of these respects than the Governor.”

And in *The Law of Extradition*, by Spear, in referring to the provisions in the several extradition treaties of the United States, it is observed that the offense charged in the demand made for the fugitive from justice shall be proved by such evidence,

“as according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed. The delivering government, and not the one making the demand, is by the terms of the treaty in regard to evidence the final judge as to the propriety of the demand, and also as to the sufficiency of the evidence in its support. It applies its own rule of evidence to the case, and withholds or grants the surrender under that rule.”

While the charge in said information may be a little lame in some unimportant particulars, and perhaps is, still we think the

1916.]

Stark County.

objection made is technical and that it charges the offense of obtaining money by false pretenses. In *Jackson v. Archibald*, 12 C. C., 155, it is held that:

“If a felony is substantially charged in the indictment attached to the requisition for the extradition of a fugitive from justice, the fact that it is inartistically drafted, or that there is some technical defect in the form of the indictment, ought not to prevail to defeat extradition.”

We are not inclined to disturb the judgment below on the ground urged.

It is contended on behalf of the plaintiff in error that the real purpose of this extradition proceeding is not to have his return ordered to the demanding state for trial on the offense laid in the requisition, but for the purpose of working out a civil remedy against him, and it is contended that this is manifest from the evidence taken upon the hearing hereinbefore referred to. If such contention was well founded, the court would be unwilling to lend its aid in the working out of any such purpose. Section 110 of the General Code provides that:

“The demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand is made in good faith for the punishment of crime and not for the purpose of the collection of debt or pecuniary mulct, or of removing the alleged fugitive to a foreign jurisdiction to serve him with civil process, and by a duly attested copy of an indictment or an information, or a duly attested copy of a complaint made before a court or magistrate authorized to take it and accompanied with an affidavit or affidavits to the facts constituting the offense charged by persons having actual knowledge thereof.”

It is apparent from the language of the foregoing section that the application for a requisition for a fugitive from justice must be founded on good faith for the sole purpose of having him answer to the identical offense charged and not for any other purpose. The presumption is that the Governor of Ohio so found before issuing the extradition warrant, but it is contended that the evidence taken before said examining judge shows other-

wise. We have carefully read the evidence taken on said hearing and find the prosecuting witness testified that after he failed to recover back money paid for certain shares of stock, he instituted this criminal prosecution. Granting this, does it follow by any principle of sound reasoning that the plaintiff in error is sought to be extradited for any other than the purpose of being prosecuted for this alleged offense in the absence of any proof to the contrary? It does not so impress the court, and it follows that the second ground of error alleged is not sustained.

Besides the errors alleged and already specifically referred to herein, said petition in error contains other errors alleged, all of which we have considered, and we find no such prejudicial error in the record for which the judgment of the court below should be reversed.

The view we have taken of this case renders it unnecessary to pass upon the motion submitted on behalf of W. S. Smathers, the sheriff of said Clarion county, and the duly appointed agent of the state of Pennsylvania for the purpose named in said requisition, in which motion it is contended that the proceedings herein are in violation of certain provisions of the Constitutions of the United States and of the state of Ohio.

The judgment of the court of common pleas will therefore be affirmed, and said cause is remanded for execution. Exceptions noted.

POWELL, J., and HOUCK, J., concur.

1916.]

Hamilton County.

**PROSECUTION FOR CONTRIBUTING TO THE DELINQUENCY
OF CHILDREN.**

Court of Appeals for Hamilton County.

JOHN PETRI V. STATE OF OHIO.

Decided, November 8, 1915.

*Criminal Law—Waiver of Jury—Presumption as to Prisoner Being
Given Opportunity to Make Statement When Sentenced—Evidence
as to Delinquency of Children.*

1. Waiver of the right to a jury trial does not clearly and affirmatively appear where the record merely states that the "defendant did not demand a trial by jury."
2. A conviction under Section 1651 of causing, encouraging and contributing to the delinquency and neglect of children must be based on evidence of the delinquency of said children.
3. Where the record does not distinctly disclose that the defendant was not asked if he had anything to say why sentence should not be passed, it will be presumed that such a question was asked in compliance with the statute.

Cowell & Lamping, for plaintiff in error.

John W. Weinig, contra.

JONES (Oliver B.), J.

Plaintiff in error was convicted by the judge of the juvenile court without the intervention of a jury, under Section 1651, General Code, of causing, encouraging and contributing to the delinquency and neglect of two girls aged respectively eight and ten years. He seeks a reversal of the judgment in this court on three grounds: 1. That the court had no authority to try plaintiff in error without a jury. 2. That the finding of the court is not supported by any evidence of the delinquency of the minors. 3. That plaintiff in error was not asked, after being found guilty and before sentence, if he had anything to say why sentence should not be pronounced against him in accordance with the requirements of Section 13694, General Code.

1. The record as presented fails to show distinctly that the defendant below waived his right to a trial by jury but merely that the "defendant did not demand a trial by jury." It is held in the case of *Simmons v. State*, 75 Ohio St., 346, that the waiver of a right to a jury trial must clearly and affirmatively appear on the record, and can not be assumed or implied by a reviewing court from his mere failure to demand a jury.

2. The record fails to show proof of the delinquency of the minor children or record their conviction as such delinquents. In the original Section 1651, General Code, in accordance with which the affidavit was drawn, the offense provided contemplated the existence of a delinquency in the child. The section as amended in 103 O. L., 871, provided another offense, to-wit: "acting in a way tending to cause delinquency in a child."

While the record might establish the latter offense, it is not sufficient to establish the offense charged in the affidavit without evidence of the delinquency of the children, and without such proof the charge must fail, no matter how culpable the acts of the defendant may be. *Fisher v. State*, 84 Ohio St., 360, 369.

3. The record does not distinctly disclose that defendant was not asked if he had anything to say why sentence should not be passed upon him before the sentence was actually pronounced. It must therefore be presumed that such a question was asked in compliance with Section 13694, General Code; *Bond v. State*, 23 Ohio St., 349; *Carper v. State*, 27 Ohio St., 572; *Bartlett v. State*, 28 Ohio St., 669.

For the reasons stated the judgment must be reversed.

JONES (E. H.), J., and GORMAN, J., concur.

1916.]

Stark County.

**INCOMPETENT STATEMENT BY CORONER AS TO WHAT
CERTAIN INSANE PATIENTS HAD TOLD HIM.**

Court of Appeals for Stark County.

GEORGE E. DAWSON V. STATE OF OHIO.

Decided, February Term, 1916.

*Evidence—Constitutional Right Denied—In Admission of Statements
Made by Insane Patients to Coroner—Circumstances Under which
a Defendant is Not Required to Speak—Criminal Law*

In the trial of an attendant in a hospital for the insane for the unlawful killing of one of the patients, it is a deprivation of a constitutional right guaranteed to the defendant to admit in evidence a statement by the coroner of what was told him three days later by certain insane patients as to the circumstances of the killing which they had witnessed, the testimony of members of the medical staff of the hospital being to the effect that said patients did not have the mental capacity to properly observe the incidents which took place or the memory to relate accurately what took place.

Chas. C. Upham, for plaintiff in error.

A. T. Snyder, Prosecuting Attorney, and *Henry Harter, Jr.*,
Assistant Prosecuting Attorney, contra.

SHIELDS, J.

The plaintiff in error was indicted at the September, 1914, term of the Court of Common Pleas of Stark County for the unlawful killing of one Alfred Tisch, on the 13th day of September, 1914. Upon a plea of not guilty, he was tried and convicted of said crime. A motion for a new trial was made wherein various reasons were set forth why said motion should be granted, which said motion was by the court overruled, and the plaintiff in error was thereupon sentenced according to law. A bill of exceptions was afterward taken embodying all the evidence and proceedings of said trial, including the charge of the trial court to the jury, and by a petition in error filed the judgment of said court is now brought before this court for review.

The principal errors complained of by the plaintiff in error are that the court below erred in the admission of certain evidence upon the trial, that the verdict of the jury is not sustained by sufficient evidence to warrant the conviction of the plaintiff in error of the crime charged, and that said verdict was contrary to law.

It appears that the plaintiff in error was on the day in question and for a year or more prior thereto had been employed at the Massillon State Hospital as an attendant and as such he had charge of and was required to exercise supervision over and control of the decedent and forty-eight other insane patients in a certain ward in said hospital, in which said ward the decedent had been confined as an insane patient for over a year. At an early hour on said morning, Sunday, September 13th, said attendant went on duty and entered said ward and requested the decedent to make up certain beds in said ward as he had been in the habit of doing, when the decedent declined to do so and assaulted the plaintiff in error by striking him in the face, breaking his spectacles, as claimed by him, whereupon the two wrestled with each other and so continued until they reached an adjoining wash-room, when and where the decedent fell over and soon thereafter died. It further appears that on the following Wednesday, September 16th, the prosecuting attorney and Dr. Frank W. Gavin, the coroner of said county (and after a coroner's inquest had been held, as claimed by him), went to said hospital and caused to be brought before them, in a certain room therein, separately and in charge of a guard, certain insane patients confined in said hospital, in said ward, to-wit: William Ring, Edward E. Potter, James McCauley, Daniel M. Call and Austin Marsteller, and in the presence of the plaintiff in error, said insane patients were interrogated by the prosecuting attorney and said Gavin as to what had occurred between the plaintiff in error and the decedent on the said Sunday morning. Said insane patients at said time undertook to and related what they claimed occurred between said parties on said morning, and that the plaintiff in error who was present made no reply thereto, nor was any inquiry made of him. The said Dr. Gavin

1916.]

Stark County.

in the evening of said day claimed to have made notes of the statements so made by said insane patients concerning said occurrence. Afterward, and on the 18th day of September, 1914, the plaintiff in error was arrested before a justice of the peace, charged with the unlawful killing of the decedent. After being indicted and when placed on final trial for said crime, the State sought to introduce in evidence by the witness Gavin the statements so made by the said insane patients to him and to the prosecuting attorney, to which the plaintiff in error by his counsel objected, and who at said time offered to show by the testimony of medical witnesses connected with said hospital, and who were familiar with the mental condition of said insane patients, that they were not mentally capable of observing the incidents of said occurrence on said Sunday, nor did they have sufficient memory to enable them to retain and afterwards state what they may have observed at that time, which said offer was objected to by the State and said objection sustained, and said objection made to the evidence proposed to be offered by the witness, Dr. Gavin, was also overruled, to which the plaintiff in error excepted.

Thereupon, over the objection of the plaintiff in error, the witness, Dr. Gavin, was permitted to give to the jury what he claimed to be the statements of the said insane patients, made under the circumstances and in the manner heretofore described to the prosecuting attorney and himself, on Wednesday, September 16th. This action on the part of the trial court is assigned as prejudicial error.

Upon the trial it was admitted by the State that the said Ring, Potter, Call, McCauley and Marsteller were insane patients in said hospital and that they had been committed to and confined therein as such patients for a considerable period of time.

Under the laws and Constitution of this state, could said admitted insane patients, confined as they were at the time of said trial in said hospital, be permitted to speak and testify to material matters through the witness, Dr. Gavin, an intelligent and experienced witness in criminal trials, as his official relation would imply, against a citizen on trial charged by indictment with a felony?

Article I, Section 10 of the Constitution, provides, among other things:

“In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court.”

In the case of *Summons v. State*, 5 O. S., 325, it is held that:

“The clause of the tenth section of the Bill of Rights providing that ‘on any trial, in any court, the party accused shall be allowed to meet the witness face to face,’ which, like numerous other provisions in the Bill of Rights, is a constitutional guaranty of a fundamental principle well established and long recognized at common law, has reference to the personal presence of the witnesses called to testify, and not the quality or competency of the evidence to be given.”

And the judge delivering the opinion in said case says:

“The scope and operation of it are clearly defined and well understood, in the common law recognition of it, and the assertion of it in the fundamental law of the state, was designed neither to enlarge nor curtail it in its operation, but to give it permanency and secure it against the power of change or innovation.”

This constitutional guaranty is now and always has been the sacred right of any one charged with a crime, and in no case can it be invaded or taken away. In such case the accused is entitled to “meet the witness face to face” and to have an opportunity to cross-examine such witness, or witnesses, and in addition, the

1916.]

Stark County.

accused likewise has the right to test the qualifications of a witness before testifying when his competency as a witness is questioned in good faith. In the case before us it appears that the plaintiff in error was deprived of these legal rights, and each of them.

On the trial the learned judge seems to have admitted the testimony of the witness, Dr. Gavin, in permitting him to narrate the said statements of the said insane patients, on the ground that the jury were to judge of the effect of the silence of the plaintiff in error at the time said statements were made. There may be cases where parties accused of crime are called upon to speak, but the case presented by this record leads us to the conclusion that *under the circumstances* the plaintiff in error was not required to speak, and this conclusion is strengthened by the evidence of the witnesses of the medical staff connected with the hospital, who knew of the mental condition of the said insane patients and who testified that they did not have "the mental capacity to properly observe the incidents of the occurrence between Dawson and Tisch and afterwards have mental capacity enough to relate properly and accurately what took place."

Without pursuing this subject further, we are of the opinion that the plaintiff in error was deprived of his constitutional rights in the respects hereinbefore indicated; that the admission of the statements made by the said insane patients to the witness, Dr. Gavin, was prejudicial error; that said verdict is manifestly against the weight of the evidence, and that said judgment of conviction and sentence is contrary to law.

The judgment of the court of common pleas will therefore be reversed, and said cause will be remanded to said court for such further proceedings as may be deemed proper.

POWELL, J., and HOUCK, J., concur.

LIABILITY FOR INNOCENTLY MAKING FALSE REPRESENTATIONS AS TO VALUE.

Court of Appeals for Hamilton County.

LIZZIE GAISSE V. JOHN HANSEN ET AL.*

Decided, October 23, 1915.

Bank Stock—Given in Exchange for Property—Unexpectedly Proves Worthless Soon Thereafter—Action for Rescission of the Contract—Liability for False Representations Innocently Made—Defendant Given the Option of Making the Vendor Good or Submitting to a Rescission.

1. Under the rule that one who obtains the property of another through untrue statements, though in ignorance of their falsity, must be held responsible for a legal fraud, the defendant in the present case is required to make good to plaintiff the amount of loss sustained by her by reason of her reliance on representations made by him as to the value of certain bank stock given to her in part payment for real estate.
2. In an action for rescission of a contract for sale of real estate and reconveyance of the property to plaintiff, on the ground of misrepresentation as to value, a court of equity, upon finding that the misrepresentations were made as to a material fact and not as an expression of opinion will give the defendant the option of making the plaintiff whole as to the amount lost by reason of such misrepresentations or a reconveyance of the property upon receiving the return of the consideration.

Herrlinger & Dixon and Healy, Ferris & McAvoy, for plaintiff.

Frank H. Kunkel, contra.

GORMAN, J.

This case is here on appeal from the judgment of the court of common pleas.

It appears from the record in the case that the plaintiff, prior to March 27, 1912, was the owner in fee simple of certain real

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, February 29, 1916.

1916.]

Hamilton County.

estate known as No. 1015 Main street, in the city of Cincinnati, which she was willing to sell for \$14,000, and had offers to purchase the property, but not at this price. The defendant John Hansen had been her tenant for a long time in a part of the premises, and her brother, E. William Oesper, the other defendant, occupied an office in a part of the building for several years prior to said date.

Hansen, learning that the plaintiff was willing to sell her property, asked that he have the first refusal or option on the property, and proposed to pay therefor \$11,000 in cash. After plaintiff had agreed to accept \$11,000 in cash, Hansen proposed verbally to plaintiff's brother that he have the privilege of turning over to plaintiff certain stocks and a certain amount of cash, and give his note secured by mortgage on the property which he proposed to purchase, for the balance. He proposed this because he said he had not sufficient cash and that these stocks would be the equivalent of cash.

This plaintiff had known the defendant Hansen for many years, and she and her brother were on the intimate terms usually existing between brother and sister. She had great confidence in her brother and also had confidence in Hansen, her tenant. After her brother had talked to her, she agreed to sell the property and receive in payment the stock, money and note and mortgage above mentioned, upon Hansen's representation that the stocks were the equivalent of cash.

It appears that her brother thereupon prepared a paper for her to sign, in form making the proposal to sell come from her, whereas the proposal to buy came from the defendant Hansen. The following is the proposal:

"I, the undersigned, authorize E. W. Oesper to sell my house and lot No. 1015 Main street, Cincinnati, Ohio, for the sum of eleven thousand (\$11,000) dollars on the following terms, to-wit, to take the following stock in part payment:

"16 shares 2d National Bank stock to value of \$	3,760
16 shares U. S. Printing to value	1,456
Cash	1,084
	<hr/>
	\$6,300

“The balance the purchaser to give mortgage on this property to run 5 years at 6% interest, the purchaser to have the privilege of paying \$500 at any time. I will pay the taxes due in June, 1912, to the amount of \$72. All other taxes and assessments to be paid by the purchaser.

“(Sgd.) LIZZIE GAISSEER.

“I accept the above proposition.

“(Sgd.) JOHN HANSEN.”

The evidence tends to show that this paper was signed on or about March 27, 1912, although the negotiations were carried on for perhaps a week prior to that time. It further appears that during the negotiations, either before or at the time this proposition was signed by the plaintiff, her brother assured her that the stock of the Second National Bank was good, that he had bought some himself. Hansen told her the stock was worth \$235; that he had paid \$235 for it, and it was worth that and he was putting it in at \$235 to her. The evidence discloses that she knew nothing about the value of the stock and that she relied upon the representations of Hansen and her brother. She had a right to rely upon the representations of Hansen in view of his friendly relations and long acquaintance with her, and she had a right to rely upon the representations of her brother as to the value of the stock.

After the agreement was entered into it was consummated by the conveyance to the defendant Hansen of the premises by Mrs. Gaisser. Hansen delivered to Mrs. Gaisser sixteen shares of Second National Bank stock, sixteen shares of United States Printing Company stock, paid her \$1,084 in cash, and executed and delivered his note and mortgage for \$4,700 in accordance with the terms of the agreement. She placed the stock in a box of the Second National Bank, and in less than three weeks from the date of the consummation of the transaction the Second National Bank was known to be hopelessly insolvent, its entire capital stock and the greater part of its surplus wiped out under the orders of the Comptroller of the Currency and an assessment of one hundred cents on the dollar was then levied against the stockholders.

1916.]

Hamilton County.

The evidence tends to show that at the time this agreement was entered into, March 27, 1912, this stock was worth about five dollars per share, or the entire sixteen shares were worth about eighty dollars. We think the evidence tends to show that Hansen believed the stock to be worth \$235 when he bought it and when he put it in to Mrs. Gaisser at that price. The evidence does not disclose that Hansen had any fraudulent intent in representing the stock to be worth \$235 per share, but he honestly believed it to be worth that, and it is probable that Oesper, the brother of plaintiff, believed the stock to be worth something in the neighborhood of \$235, although he himself had bought the stock some time before at \$210. The evidence discloses that Oesper was anxious to consummate this sale. He was to get a commission from his sister on the sale. He was on friendly terms with Hansen and anxious to please him.

As soon as the plaintiff discovered that the stock was practically worthless, she tendered it back, together with the United States Printing Company stock and the cash she had received and the note and mortgage, and offered to cancel the mortgage, and she also asked for a reconveyance of the real estate. In other words, she rescinded the contract in so far as she could, as promptly as it could be done after the discovery of the fact that the Second National Bank stock was almost valueless. Hansen having refused to make a reconveyance, this action was brought praying for a rescission of the contract and a reconveyance of the real estate.

We shall not undertake to analyze the evidence but the statement above made substantially represents the facts necessary to be set out in the consideration of the legal questions involved.

It is claimed by the plaintiff that the representation by Hansen that the Second National Bank stock was worth \$235 is tantamount to a guaranty that the stock was worth that amount; whereas it is claimed by the defendant Hansen that he acted in good faith and without any fraudulent motive or intent, and that he honestly believed the stock to be worth the amount which he said it was worth, and furthermore that it was but an expression of his opinion as to the value of the stock, and there-

fore the representation did not amount to a guaranty and a rescission should not be awarded.

We are of the opinion that the statement made by Hansen as to the value of the stock was not an expression of an opinion, but was a statement of fact as to the value, and that he must be held to the value which he placed upon this stock. The consequences to Mrs. Gaisser, the plaintiff, were just as disastrous as though Mr. Hansen had knowingly made a false statement as to the value of the stock. Her loss was just as great as though he had falsely and fraudulently represented the stock to be of the value of \$235. He had no right to make a representation of this character to her, unless he knew the stock to be of the value which he put upon it. As was said by Judge Cooley in the case of *Converse v. Blumrich*, 14 Mich., 109, at page 123:

“The courts must look at the effect of untrue statements upon the person to whom they are made, rather than to the corrupt motive of the one making them. If one obtains the property of another by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud.” See also, *Holcombe v. Nobbe*, 69 Mich., 396.

In *Mulvey v. King*, 39 O. S., 491, which was an action at law and not one in equity, the court on page 494 employs this language:

“It may be considered as well settled in this state, by the cases above cited” (26 O. S., 428; 33 O. S., 283; 15 O. S., 145), “that an action for damages caused by misrepresentation can not ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles can not be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value or character of the subject-matter of the contract, that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it.”

1916.]

Hamilton County.

Now in the case at bar the defendant Hansen is seeking to hold the benefit of a contract entered into between himself and Mrs. Gaisser. This is an action in equity, and whatever may be the rule at law with reference to actual fraud, we apprehend that it will not be denied that in equity it is not necessary that the fraudulent intent be shown in order that a court of equity may grant relief to a complainant against consequences which result from a mis-statement of fact by a person who secures a benefit or advantage thereby. In this case the representation as to the value of this stock was material. It is not probable that Mrs. Gaisser would have sold her property for \$3,760 less than \$11,000. It is not probable that she would have taken the stock of the Second National Bank at \$235 per share had she known that it was practically worthless. So there can be no question but that it was a material representation, nor can there be any question but that it was false, although not known to be false by Mr. Hansen. Nor can it be questioned that Mrs. Gaisser relied upon the representation made by Hansen; and from her acquaintance with Hansen and her relations towards him she had a right to rely upon his representations. So that we think the rule laid down in *Mulvey v. King* is not only a sound rule as applied to a legal case, but also a much sounder rule when applied to a case in equity.

It can not be claimed, we think, that Hansen's statement as to the value of this stock was an expression of opinion. He did not put it as an expression of opinion, but as a statement of fact, and it will be found that the cases in which a person is permitted to express an opinion and not be held liable, present quite a different situation from the case in which a person makes a representation of fact on which another relies and has a right to rely and which is material to the transaction.

We have come to the conclusion in this case that if the parties can be put *in statu quo* this court should grant a rescission of this contract, but we are not prepared to say that the parties can be restored to the situation in which they were at the time this contract was executed. It is quite probable that the value of this real estate has increased since the sale was made, and a

rescission of this contract would give the benefits of this enhanced value to the plaintiff and deprive the defendant of this advantage when he had no intention of committing a wrong. We are of the opinion, therefore, that the defendant should be given the option of accepting a decree of rescission, or a decree allowing the plaintiff compensation for the loss which she has sustained on the Second National Bank stock.

There is evidence tending to show that the real value of this stock on the 27th of March, 1912, the time this contract was entered into, was about \$5 per share according to the books. This is the testimony of Mr. Gutting, the assistant cashier of the bank. We are not speaking now of the market value of the stock, because there is no evidence of sales having been made about the time this contract was entered into. Furthermore, it is not a question of what was the market value of the stock under the representations made, but what was the real value of this stock. Mrs. Gaisser had a right to expect \$11,000 or the equivalent thereof for her property. She thought she was getting the equivalent of \$11,000, and she was justified in believing this on the representations of Mr. Hansen. We find, therefore, that in this case there should be a rescission of this contract, unless the defendant Hansen is willing to compensate Mrs. Gaisser for the loss she has sustained because of his misrepresentation as to the value of the Second National Bank stock. If Hansen is willing to compensate her to the extent of \$3,680, which is the difference between the actual value of the stock and the value as represented by Hansen, a decree may be entered accordingly; otherwise, a decree may be entered rescinding the contract.

We are of the opinion that this course is warranted by this court sitting as a court of chancery, under the authorities. Section 237, Pomeroy's Equity Jurisprudence, 3d Ed., 342:

"If a court of equity obtains jurisdiction of a suit for the purpose of granting some distinctly equitable relief, such, for example, as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from facts disclosed on the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has

1916.]

Hamilton County.

become impracticable, and the plaintiff is entitled to the only alternative relief possible of damages, the court then may and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages.”

In 24 Am. & Eng. Encyclopedia of Law, 2d Edition, page 616, we find a correct statement of the law as we understand it:

“Although in a given case a court of equity refuses to grant rescission of a contract procured by fraud, because this relief under the circumstances would be inequitable, still as the court has jurisdiction of the cause for the purpose of granting purely equitable relief, it may proceed to do complete justice between the parties by making such a decree as the merits of the case will warrant, and thus it may give damages for the fraud, although this relief is purely legal.”

In support of this proposition see the following cases: *Betts v. Gunn*, 31 Ala., 219; *Shaffeer v. Sleeve*, 7 Blackf. (Ind.), 184; *Carroll v. Rice*, Walk. (Mich.), 374; *Holland v. Anderson*, 38 Mo., 55; *Grymes v. Sanders*, 93 U. S., 55; *Thorne v. French*, 4 Mis. Rep. (N. Y.), 436; *McDaniel v. Lee*, 37 Mo., 204.

A decree may be entered in this case in accordance with these conclusions.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

ERROR IN DIRECTING VERDICT ON STATEMENT OF COUNSEL.

Court of Appeals for Coshocton County.

**THE COMPTON-PRICE PIANO CO. v. THOMAS C. STEWART
AND LILLIAN C. STEWART.**

Decided, 1913.

Judicial Discretion—Abuse of, in Directing a Verdict for Defendant on the Statement of Plaintiff's Counsel—Right of Counsel to Modify or Explain His Statement to the Jury.

For a court to direct a verdict for the defendant, after hearing counsel state their case to the jury, is an arbitrary and unreasonable exercise of judicial authority and such an abuse of discretion as to require a reversal of the judgment by the reviewing court, where after the statement by counsel for the plaintiff had been challenged by the court no opportunity was given to modify or explain or add to the statement so made.

*C. R. Bell and C. O. Turner, for plaintiff in error.
J. C. Adams, contra.*

POWELL, J.

This action was commenced before a justice of the peace to recover a judgment for a balance due upon certain notes executed by the defendants in error to the plaintiff in error, the amount of said notes being \$276, exclusive of interest. A chattel mortgage had been given by the defendants to secure the payment of said notes. This chattel mortgage was given by the defendants upon a piano and other property: \$22 was paid by the defendants upon the purchase price, \$12 of which should have been credited upon the notes, and the same was so credited. The piano was replevined by the plaintiff and sold for the sum of \$105, which amount was also credited upon the notes, leaving a balance of \$164.85, exclusive of interest, due and unpaid upon the notes from the defendants to the plaintiff. The case was taken by appeal from the judgment of the justice of the peace

1916.]

Coshocton County.

to the court of common pleas, where pleadings were filed setting up the respective claims of the parties, and at the trial in that court upon the appeal, the plaintiff, by his counsel, stated his case to the jury that had been impaneled to try the same, together with the evidence by which he intended or expected to support the same. The defendants, by their counsel, then made a statement of their defense, upon which the court announced that he would direct a verdict for the defendant upon the theory that the evidence which the plaintiff intended to offer, as shown by the statement of its counsel, would not sustain a verdict in its favor, and the court did so direct a verdict without giving to plaintiff's counsel any opportunity to explain or qualify the statement that had been made by him with reference to the evidence that he intended to introduce.

The statement of counsel is a part of the trial of cases and is provided for by Section 11447 of the General Code.

That the court may direct a verdict or arrest the case from the jury and enter a judgment of dismissal of plaintiff's petition and for costs, after the opening statement of counsel for plaintiff has been made and before the introduction of any evidence in the case, has been held to be the law in the case of *Cornell v. Morrison*, 87 O. S., 215, but in such case it must appear that such statement gives in detail all the evidence plaintiff proposes to offer in support of the averments of his petition, and if such statement be challenged by opposite counsel or the court, fair opportunity must be given for it to be explained and qualified and for additions to be made thereto if any part of the evidence has been overlooked, and then if it be apparent that such qualified statement does not state such facts which, if true, will sustain the material averments of the petition, it becomes the duty of the trial court to arrest the case from the jury and enter judgment, dismissing the petition and for costs.

The record in this case discloses that the court below proceeded to direct a verdict without permitting any opportunity to plaintiff's counsel to amend or qualify his statement to the jury, and without any opportunity to add to or explain any of the things stated by such counsel in such opening statement. The record

does not show what such opening statement to the jury was, as the same was not taken down at the time it was made, but it does show that, after such statement was challenged by the court, counsel for plaintiff requested to be permitted to amend his statement, and the court refused to allow such amended statement to be made and no opportunity was given to qualify or explain the matters complained of. This, we think, was an unreasonable and arbitrary exercise of the authority of the court, and was such an abuse of its discretion as requires a reviewing court to set aside the verdict rendered upon such direction to the jury and to reverse the judgment rendered thereon.

The record shows that the court, after such direction had been given, permitted an amended statement to be made, and the same was entered as a part of the bill of exceptions, and which we have examined. This amended statement sets out a cause of action which, if sustained by the proof, entitles plaintiff to recover judgment thereon; and plaintiff should have been permitted on the trial to submit the same, together with his evidence, under proper instructions from the court, to the jury for determination. The verdict of the jury so ordered will be set aside and the judgment of the court of common pleas will be reversed. The cause will be remanded to that court for a new trial and for such other proceedings as are authorized by law.

VOORHEES, J., and SHIELDS, J., concur.

1916.]

Warren County.

ACTION FOR INJURIES RECEIVED ON A DEFECTIVE SIDEWALK.

Court of Appeals for Warren County.

VILLAGE OF LEBANON V. SCHWARTZ.

Decided, February 4, 1915.

Municipal Corporations—Injury on Defective Sidewalk—Evidence as to the Condition of the Walk Both at the Time of the Accident and Subsequent Thereto—For What Purpose Such Evidence is Admissible—Failure to Restrict Evidence to Its Proper Purpose in Instruction to Jury.

Where, in an action for damages for personal injuries received by reason of a defective sidewalk, a view of the sidewalk is had by the jury, and afterwards during the trial of the case evidence is offered and admitted, over repeated objections of counsel for the village, showing change in and labor performed on the sidewalk since the accident, and where objecting counsel, though not asking for an instruction limiting the effect of such evidence, based the objection to such evidence upon the ground that it was "not restricted to the proper purpose." *Held:* Such evidence was admissible only to show control by the village and the changed condition of the walk and not as proof of negligence, and the failure of the trial judge to so instruct the jury was error which requires a reversal of the judgment.

Hamilton & Langdon, for plaintiff in error.

Milton Clark and Robert J. Shawhan, for defendant in error.

JONES (E. H.), J.

Heard on error.

The defendant in error, Mary A. Schwartz, recovered a judgment against plaintiff in error, the village of Lebanon, in the court below on account of personal injuries received by her from slipping upon an alleged defective sidewalk.

We are of the opinion that the trial court erred to the prejudice of plaintiff in error by failing to instruct the jury that the evidence as to a change in the sidewalk in question caused by the hauling of gravel and by labor performed at the point where the accident occurred, and admitted over the objection of

plaintiff in error, was only competent to show the changed condition and the control of the village, and was not to be considered by them as any evidence of actionable negligence on the part of the village.

It is argued by counsel for defendant in error that this error can not be relied upon for reversal, for the reason that the court was not asked to so restrict the evidence at the time.

While the objection was repeatedly, and we might say in every instance, made to this evidence as being incompetent, irrelevant and immaterial, there is but one place so far as we have been able to find where the court was given any intimation as to the specific ground of objection. On page 92 we find the following:

“Have you recently hauled any gravel or placed any gravel at the end of the walk on the west side, or just north of the laundry where the sidewalk on Broadway runs down to the Cincinnati pike?”

“(Objection by Mr. Langdon. Objection overruled and exception taken.)”

“By Mr. Langdon: We object to the general form of the question as not restricted to the proper purpose.”

As a matter of practice, what counsel should have done was to have asked the court to restrict the evidence “to the proper purpose.” But in view of the well settled principle of law, as laid down in the cases cited in brief of counsel for plaintiff in error, as well as in many other cases in Ohio, we feel that it was the duty of the court to so charge the jury upon admitting the evidence over the objection of counsel, without a request so to do; and the omission to so restrict the evidence at the time must be held to be prejudicial to plaintiff in error. See *Brewing Co. v. Bauer*, 50 Ohio St., 560; *City of Circleville v. Sohn*, 20 C. C., 377.

It is practically conceded by counsel for defendant in error, in their brief, that if the trial court had been asked at the time to limit the scope of this evidence, it would have been prejudicial error for him not to have done so. In support of the proposition that the instruction must have been asked in order that

1916.]

Warren County.

the failure to instruct shall be a ground for reversal, we are cited to 1 Thompson on Trials' (2d Ed.), Section 693, and to the case of *Brooklyn St. Rd. Co. v. Kelley*, 6 C. C., 155.

The second paragraph of the syllabus in the case cited is in no wise in conflict with our finding in this case. We find no reference in the syllabus, which is supposed to state the law of the case, to the duty of the court to restrict the scope of the evidence in any way; and from a reading of the opinion it seems that the court's attention was not called in any manner to the inadmissibility of the evidence except by a general objection. The court, on pages 157 and 158, say:

"The objection to this question is a general objection. If it had been objected to on the ground that it could not be introduced to show negligence, or that it could not be introduced unless the time was fixed before the accident, to show notice—if the objection had been of that character, and then the question had been admitted, it is fair to presume the court would have confined the testimony to showing simply the character of the place. If the court had admitted it for the other purposes, it would have been error—but being a general objection, and the testimony being admissible for one purpose, it was not error for the court to admit it."

This language supports the position we have taken in this case. While it would have been better practice for the attorneys to have more explicitly and clearly called the attention of the court to the limitations of this evidence, we find that by the objection and statement of counsel above quoted sufficient was done to meet the requirements and to call the attention of the judge to the instruction which should have been given.

We have carefully examined the section in Thompson on Trials to which we have been cited, and from the illustrations given in the closing part of the section are of the opinion that the proposition there laid down does not bear close relation to the question in this case. It seems that the author had in mind the duty resting upon an attorney to make clear the ground of his objection where same pertained to a defect or invalidity in a written instrument offered in evidence. So far as the doctrine laid down by Thompson applies to this case, or applies

to the duty of counsel to ask an instruction limiting the effect of evidence, we think it has been complied with in this case, as shown by the record. For the reasons given the judgment is reversed and the cause remanded for a new trial.

Judgment reversed and cause remanded.

JONES (Oliver B.), J., concurs; SWING, J., not participating.

**CARRIER ENTITLED TO COLLECT CHARGES ONLY ON
SHIPMENTS AUTHORIZED BY THE SHIPPER.**

Court of Appeals for Franklin County.

MAYNARD COAL CO. v. CHICAGO, KALAMAZOO &
SAGINAW RAILWAY COMPANY.*

Decided, October 20, 1915.

Railways—Shipments en Route Should be Stopped on Notice from Shipper—Connecting Carrier Not Entitled to Charges for Carrying Shipment After it Was Ordered Stopped—Authority of Forwarding Carrier—Demurrage.

1. Where a shipper notifies a carrier to stop certain carload shipments at a designated point *en route* and to hold for further shipping orders, such carrier is bound to do so, if not an unreasonable interference with the carrier's business.
2. A connecting carrier receiving goods for transportation by virtue only of the authority of the previous carrier, is bound to take notice of the authority of the latter at the time the goods are so received.
3. A carrier directed by the shipper to make a certain delivery of the goods shipped is bound to do so promptly, and is not authorized to hold the same because of a controversy with associated carriers over a division of the freight charges and to charge the demurrage occasioned thereby to the shipper.

Charles J. Pretzman, for plaintiff in error.

Wilson & Rector, for defendant in error.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, December 11, 1915.

1916.]

Franklin County.

ALLREAD, J.

The Chicago, Kalamazoo & Saginaw Railway Company brought suit in the court below against the Maynard Coal Company to recover the sum of \$1,749 with interest, upon an account for switching charges and car service (demurrage) upon certain shipments of coal in carload lots during the months of April and May, 1912.

Upon the issues made by the pleadings and the trial statement of counsel for the coal company, the court instructed the jury to return a verdict in favor of plaintiff for the full amount claimed. This was done and a judgment was rendered upon the verdict. A motion for a new trial was overruled and bill of exceptions taken embodying the statements of counsel.

Error is prosecuted to this court.

The coal company rests largely upon the second defense of its second amended answer. This defense, in brief, is that the coal company delivered certain carloads of coal to an initial carrier for through shipment to Kalamazoo, Michigan; that the initial carrier delivered the coal to the Lake Shore & Michigan Southern Railway Company as an intermediate carrier, which in turn delivered the same to the Chicago, Kalamazoo & Saginaw Railway Company for carriage and final delivery; that the coal company, on April 11, 1912, notified the Lake Shore & Michigan Southern Railway Company to deliver no more of said shipments to the Kalamazoo company, but to retain the same for further shipping orders. Thereafter the coal company sold said coal to the Lake Shore & Michigan Southern Railway Company and ordered the Kalamazoo company to deliver said coal to the Lake Shore & Michigan Southern Railway Company, but that, owing to a controversy between the Kalamazoo company and the Lake Shore company as to division of freight charges, the Kalamazoo company refused to deliver said coal as directed, but continued to hold the same subject to demurrage charges until the coal company, in order to procure the delivery of the coal to the Lake Shore company, sent a telegram agreeing to pay the demurrage and car-service charges of the Kalamazoo company.

The coal company further avers that the initial carrier and the Lake Shore and Kalamazoo companies were conducted as a single system, for the purpose of traffic, known as the New York Central Lines. Issue was joined in the reply by general denial.

It appears from the statement of counsel that it was proposed to be shown that notwithstanding the order of April 11, 1912, the Lake Shore company continued to deliver the shipments of coal to the Kalamazoo company according to the original order of shipment. Counsel also offered to show that after the order of the coal company to re-deliver the coal to the Lake Shore company, the Kalamazoo company retained the same on account of a controversy between it and the Lake Shore Company as to the division of the freight rate, and that the coal company was compelled to agree to pay the switching and demurrage charges in order to obtain a delivery of the coal. The offer in the telegram of May 14 is void under the common law unless independent thereof the charges were legal, and is equally void under the present regulatory statutes.

It is not denied that the Kalamazoo company performed the services for which the charges were made. The only question is whether it was justified under the facts of the case in the performance of such services and charging the same to the coal company. We are unable to agree with the trial court that the Kalamazoo company was justified in charging the coal company with the demurrage after it had received notice to deliver the same to the Lake Shore company. It was clearly the duty of the Kalamazoo company to make such delivery promptly upon receiving notice to that effect, and it had no right because of a controversy between it and the Lake Shore company to hold the shipment and charge demurrage to the shipper.

Whether the Lake Shore company was bound by the notice of April 11, 1912, to hold further shipments subject to the order of the shipper and whether the Kalamazoo company was bound by such notice are much more difficult questions.

The case of *Cleveland & Pittsburgh Rd. Co. v. Sargent*, 19 Ohio St., 438, holds:

1916.]

Franklin County.

“Where a party delivers to a railroad company chattels to be transported from the point of delivery to another designated point on its line, and pays the charges for such transportation in advance, he has the right as against the company, to resume the exclusive possession and control of his chattels before they have reached the destination named in the bill of lading, whenever and wherever he can do so without unreasonable interference with the business of the company.”

No issue is tendered as to unreasonable interference. The reply is a general denial. We therefore conclude that the question of interference with the carrier's business is not presented.

In the absence of a claim of unreasonable interference we think it follows that it was the duty of the Lake Shore company, upon receipt of the notice of April 11, to hold all shipments then or thereafter in its possession in obedience to said notice.

It is claimed, however, that the Kalamazoo company was not bound by the notice to the Lake Shore company and was justified in accepting the shipments tendered by the latter and in forwarding the same under the original contract with the initial carrier.

The pleadings and proffer of evidence are to the effect that the contract was made by the shipper with the initial carrier for through shipment. No routes beyond the initial carrier's line were designated by the shipper and no special contract was made by the shipper for carriage over the Kalamazoo company route.

The initial carrier was, therefore, authorized by the shipper's contract to carry over its own line to a convenient connecting point and thence over the lines of connecting carriers.

The initial carrier in the present case made its delivery to the Lake Shore company as the first connecting carrier. The latter company, not being able or desiring to complete the shipment, delivered the same to the Kalamazoo company as a connecting carrier for final delivery. The Kalamazoo company therefore received the shipment from the Lake Shore company as intermediate carrier. The right of the Kalamazoo company to receive the shipment, forward it and make final delivery rested upon the special authority of the Lake Shore company under

the original contract of shipment. The Lake Shore company was not a general agent of the shipper, but acted under special authority. When that special authority was revoked by the notice of April 11, its delivery to the Kalamazoo company was wholly unauthorized so far as the shipper was concerned. The Kalamazoo company, therefore, had no authority after the notice of April 11 to the Lake Shore company to complete the shipment and make any charges in connection therewith against the shipper.

It is urged that notice should have been given also to the Kalamazoo company, but it must be kept in view that the Kalamazoo company was not designated by the shipper and it does not appear that the shipper knew that that company would be asked to make the shipment. It would be an extraordinary burden to require the shipper to notify all carriers who might possibly be asked to carry the goods.

We think the more reasonable rule is to require the connecting carrier to take notice of the authority of the forwarding carrier, and especially should this be the rule in cases where all the carriers involved are associated together in one general system.

It is urged that when a public carrier receives goods and performs a service, such carrier is entitled to charge against the shipper the regular tariff rates, regardless of authority from the shipper to make the shipment or perform the service; in other words, that the charges follow inexorably from the fact of service. This would be a harsh and unjust construction. We think a more reasonable interpretation of the statute regulating carriers would be to hold that they apply only to shipments duly authorized by the shipper.

The trial court, therefore, erred in ignoring the defense in its entirety and in instructing a verdict for the full amount of the plaintiff's claim.

Judgment reversed and cause remanded for a new trial.

FERNEDING, J., and KUNKLE, J., concur.

1916.]

Franklin County.

APPLICATION OF THE INDETERMINATE SENTENCE STATUTE.

Court of Appeals for Franklin County.

FRANCIS V. STATE OF OHIO.

Decided, October 28, 1915.

Indeterminate Sentence—Not Applicable in Cases of Offenses Committed Prior to Its Passage.

The indeterminate sentence statute, passed February 13, 1913 (103 O. L., 29), does not apply to prior offenses.

W. A. James, for plaintiff in error.

Robert P. Duncan, Prosecuting Attorney, for defendant in error.

ALLREAD, J.

Plaintiff in error, Frank Francis, was indicted upon a charge of grand larceny. Upon plea of guilty he was sentenced to imprisonment in the Ohio penitentiary "for the term of not less than one year, nor more than seven years and that he stand committed until discharged according to law."

The offense was committed in 1911. The present indeterminate-sentence law was passed in February, 1913. The plaintiff in error was sentenced in December, 1913.

Counsel for plaintiff in error contends that the law providing for indeterminate sentences was *ex post facto* and that the sentence should have been entered according to the law existing at the time the offense was committed.

Section 7388-6, Revised Statutes, gave discretionary authority to the court to enter an indeterminate sentence. This statute, however, appears to have been repealed by the General Code. It is true that Sections 2160 and 13697, General Code, recognized general sentences, but these sections are consistent with an intention to provide for proceedings in cases of general sentence previously entered. The absence of a provision authorizing a court to sentence an offender for an indefinite period is consistent only with an intention to repeal that provision of Sec-

tion 7388-6, Revised Statutes, and to leave in force the definite-sentence statute. See *State v. Toney*, 81 Ohio St., 130.

The indeterminate-sentence act of 1913 should be applied prospectively. It was not intended it would be an *ex post facto* law and to that extent invalid. *In re Lambrecht*, 137 Mich., 450; *In re Marion*, 140 Mich., 219; *People v. Fisher*, 144 Mich., 570.

It is contended by the state that the sentence of the court is responsive to Section 12447, General Code, under which the indictment was presented and which provides:

“Whoever steals anything of value is guilty of larceny, and if the value of the thing stolen is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than seven years,” etc.

Independent of a statute authorizing indeterminate sentences, the court's duty under this section would be to impose a definite sentence.

In the case of *Picket v. The State*, 22 Ohio St., 405, it was held:

“The terms of a sentence of imprisonment ought to be so definite and certain, as to advise the prisoner and the officer charged with the execution of the sentence of the time of its commencement and termination.”

That case has been cited with approval in the recent case of *Hamilton v. The State*, 78 Ohio St., 76, 85, holding that the termination of the sentence must be definitely fixed in the judgment.

It does not appear that exceptions were noted at the time of sentence and it is probable that the attention of the trial judge was not called to this question. Nevertheless, we think an exception to the sentence was not necessary to preserve the question. *Commercial Bank of Cincinnati et al v. Buckingham et al*, 12 Ohio St., 402; *Justice v. Lowe*, 26 Ohio St., 372.

The judgment, therefore, in that it fails to fix a definite term for the ending of the sentence, is erroneous.

It follows that the sentence of the court of common pleas should be reversed and the cause remanded with instructions

1916.]

Hocking County.

to so modify the sentence as to fix a definite time for the termination thereof.

Judgment reversed.

FERNEDING, J., and KUNKLE, J., concur.

**CONSTRUCTION OF WILL AS TO CERTAIN VESTED
REMAINDERS.**

Court of Appeals for Hocking County.

MCCARTHY V. HANSEL ET AL

Decided, April 8, 1915.

Title—Deed Made by Child—Subject to be Divested During Continuance of a Life Estate—Conveyed no Interest in the Property so Passing by Will—When the Word “Owners” Means Absolute Ownership or a Fee Simple Interest.

1. The will of a testator contained a provision devising his estate to his widow for life and the following: “After the death of my wife, I give, devise and bequeath unto my children all of my estate, real or personal, of whatsoever kind and wheresoever situated, share and share alike; if any of my children should die previous to that time, leaving heirs of their body, then and in that case such heirs to take the share or shares, which would have been due to their parent or parents, if living.” *Held:* That the estate devised to each child was a vested remainder, subject to be divested by his death during the continuance of the life estate, and a deed made by such child during such time conveyed no interest in the property.
2. The word “owners,” when used in a conveyance of real estate in which the grantors covenant “that they are the true and lawful owners of said premises,” means absolute ownership or interest in fee simple.

Wilson & McBride and John C. Pettit, for plaintiff.

Binns & MacConkey and E. M. Baldrige, for Frances E. and Alma H. McCarthy.

C. V. Wright and H. M. Whitcraft, for Homer G. Hansel.

SAYRE, J.

Dennis McCarthy died January 22, 1868, leaving Alcinda McCarthy, his widow, and the following children: Charles,

Catherine, Frances E., Alma H., Thomas F., William and Mary A.

The widow died January 11, 1914.

All the children are living except (1) Thomas F., who died October 16, 1900, leaving Merrick F. McCarthy, the plaintiff, Corinne Godfrey and Idena Wilson, his children; (2) William, who died August 27, 1887, leaving Margaret Frash, Alma I. Wuebben and Philip McCarthy, his children; (3) Mary A., who died April 27, 1912, leaving Hugh A. Green and Robert D. Green, her children.

By Dennis McCarthy's last will and testament he devised his farm of about 260 acres to his widow during her natural life. The third item of the will is copied in the syllabus.

Subsequent to the death of Dennis McCarthy his widow and all of his children, by deed and mortgage, undertook to convey all such real estate with covenants reciting that they were "the true and lawful owners of said premises and have full power to convey the same; that the title so conveyed is clear, free and unincumbered; and that they will forever warrant and defend the same against the claims of all persons whomsoever."

The mortgage was foreclosed, and the defendant, Homer G. Hansel, claims now, by virtue of the deed, mortgage and foreclosure proceedings, to be the owner in fee simple of all the premises.

The children of Thomas F. McCarthy and Mary A. Green claim that the attempted conveyance of Thomas F. and Mary A. passed no title and that they are the owners of the undivided two-sevenths of the property under the provisions of the will of their grandfather.

This suit is for partition.

The first question to be determined is: What estate did the children of Dennis McCarthy take in his real property by the provisions of his will?

It is contended that the estate did not vest until the death of the widow because of the language, "After the death of my wife, I give, devise and bequeath * * *," found in the third item of the will.

1916.]

Hocking County.

But adverbs of time, such as "when," "then," "after," "thereafter," "from and after," etc., all refer to the exact instant when the life estate ends, and in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate and not to the time of vesting. *Linton v. Laycock*, 33 Ohio St., 128; *Doe, Lessee of Poor, v. Considine*, 6 Wall., 458, 18 L. Ed., 869; *Johnson v. Valentine*, 4 Sandf., 36, 43; *Moore v. Lyons*, 25 Wend., 119; *Boraston's Case*, 3 Coke, 16a; *Mining v. Batdorff*, 5 Pa., 503; *Rives v. Frizzle*, 8 Ired. Eq., 237; *Staples v. Mead*, 137 N. Y. Supp., 847; *Connelly v. O'Brien*, 166 N. Y., 406; *Hersee v. Simpson*, 154 N. Y., 496.

It is further contended that the language "which would have been due to their parent, or parents, if living," at the end of the third item of the will, indicates that the interests of the children did not vest until the termination of the life estate, for if, it is claimed, the interests had already vested they could not be still due.

But it seems a fair interpretation that this language also has reference to the possession and enjoyment of the real estate. The heirs of the body of deceased children are, at the death of the wife, to possess and enjoy that which would have been due their parents to possess and enjoy if they had outlived the widow of the testator. This in no way interferes with the idea of an immediate vesting, subject to the rights of the life tenant.

In the case of *Flanagan v. Staples*, 51 N. Y. Supp., 10, the language of the will was:

"Upon the death of my said wife, I give, bequeath, and devise all my estate and property unto my children, in equal shares or portions, share and share alike, absolutely and forever. In the event of the death of any of my children, leaving issue * * * such issue shall take the share or portion * * * which the parent would have taken if living."

The court held the remainder was vested.

The language "which would have been due to their parent, or parents, if living," and the language "which the parent would have taken if living," mean substantially the same thing.

In the case of *Camp v. Cronkright*, 13 N. Y. Supp., 307, the language of the will was:

“Upon her [the widow’s] death then I give and devise the same unto my children, share and share alike, absolutely and forever, the child or children of any deceased child of mine to take the share which his, her, or their parent would have taken if living.”

The court held that the remainder was vested.

Similar language and the same holding will be found in the case of *In re McCauley et al*, 144 N. Y. Supp., 313.

Some rules for distinguishing between contingent and vested remainders which are found in the books and which are assembled in the case of *Doe, Lessor of Poor, v. Considine, supra*, may be repeated here and considered in the further examination of the will in controversy:

1. “The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested.”

2. “It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.”

3. “A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed *in futuro*. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must vest in the grantee during the continuance of the estate or *eo instanti* that it determines.”

4. “Where a remainder is limited to a person *in esse* and ascertained, to take effect by express limitation, on the termination of the preceding particular estate, the remainder is unquestionably vested.”

5. “Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to be determined by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession.”

6. “It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent.”

7. “It should be remembered, too, that no degree of uncertainty as to the remainder-man’s ever enjoying the estate which

1916.]

Hocking County.

is limited to him by way of remainder will render such remainder a contingent one, provided he has, by such limitation, a present absolute right to have the estate the instant the prior estate shall determine."

8. "The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."

9. "The contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person, or upon the happening of a dubious and uncertain event."

In the instant case a present interest, on the death of the testator, did pass to certain and definite persons—that is, his children—to be enjoyed in the future. There was a life estate to support the interest which passed to each of them. The remainder passed out of the grantor on the creation of the life estate which was devised to his widow. It vested in the children at the very instant the life estate commenced. The possession and enjoyment passed to the children immediately upon the termination of the life estate. The remainders devised to the children of Dennis McCarthy were limited to take effect immediately upon the determination of the life estate of his widow, which estate was to determine by an event (the death of the widow) that must unavoidably happen by the efflux of time, and upon the death of Dennis McCarthy the remaindermen, his children, were *in esse* and ascertained, and nothing but their own deaths, before the determination of the life estate of the widow, could have prevented their remainders from vesting in possession. There is no uncertainty of the right of enjoyment in the children. They had a present absolute right to have the estate in possession the instant the prior estate determined. The remainders are limited to certain and definite persons—testator's children—and upon a certain and definite event—the death of the widow.

Another familiar rule is stated thus: "An estate once vested will not be divested unless the intent to divest clearly appears."

The following rule will be found in Gray's *The Rule Against Perpetuities* (3d Ed.), page 85:

“Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent.”

In the will of Dennis McCarthy there is a complete devise of a vested interest, subject to the life estate; then a clause is added after the semicolon divesting the interest on the contingency of death of the devisee before the life tenant. And under this rule the vested interest is subject to be divested upon the happening of such contingency.

A full statement of the rule marked 5, in *Doe, Lessor of Poor, v. Considine, supra*, is as follows:

“Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder.”

In the case at bar the estate is limited over in the event of the death of any child of Dennis McCarthy before the determination of the life estate, and under the rule it is subject to be divested by the death of any child and vests in the heirs of his body if *in esse* and ascertained.

1

Hocking County.

e case of *Jeffers v. Lampson*, 10 Ohio St., 101, 104, the
he son dying before the widow was to go to a survivor,
upreme Court held the share vested, subject to be
n the contingency therein stated.

of *Flannagan v. Staples, supra*, the court held that
the testator took a vested interest, subject to be
, in case of his death before the decease of the widow, in
or of his surviving issue.

The same holding will be found in *Camp v. Cronkright, supra*;
In re McCauley et al, supra.

In *Lyons v. Ostrander*, 167 N. Y., 135, 60 N. E. Rep., 334,
the will, after making provision for Jacob Weeks Cornwell dur-
ing his life, contains this clause:

“Upon his death I give, devise and bequeath the said lots of
land and buildings to Virginia Cornwell, wife of said Jacob
Weeks Cornwell, Ida Van Cott, Clarissa Lyon and Millard Fill-
more Cornwell, children of said Jacob Weeks Cornwell, share
and share alike, the issue of such as may have died to take the
share to which his, her or their parents would, if living, have
been entitled.”

The court of appeals of New York held that the remainder-
men took vested interests, “and where one predeceases the life
beneficiary her share becomes divested and vests in her issue, and
a trustee under her will does not take any interest in the prop-
erty.”

The following authorities sustain the rule: *Ranhofer v. A.
C. & H. M. Hall Realty Co.*, 128 N. Y. Supp., 230; *Schwartz v.
Rehfuss*, 114 N. Y. Supp., 92; *Boyd v. Sanders*, 141 Ga., 405,
81 S. E. Rep., 205; *Sumpter v. Carter*, 115 Ga., 893, 42 S. E.
Rep., 324; *Fields v. Lewis*, 118 Ga., 573, 45 S. E. Rep., 437;
Hervey v. McLaughlin, 1 Price Eng. Ex., 264; *Straus v. Rost*,
67 Md., 465, 10 Atl. Rep., 74; *McArthur v. Scott*, 113 U. S., 340,
28 L. Ed., 1015; *White v. Smith*, 87 Conn., 663, 89 Atl. Rep.,
272, 275, and cases there cited; 2 Underhill on Wills, Section
867.

The case under consideration is not controlled by *Linton v.
Laycock*, 33 Ohio St., 128. That case approves *Brasher et al v.*

Marsh et al, 15 Ohio St., 103, and the third paragraph of the syllabus in the latter case reads:

“The words ‘or their heirs’ were designated to provide for the case of such children as might die before the final distribution—not a new class of beneficiaries. ‘Heirs’ is used as a word of limitation, and those only can claim under it who derive title through a deceased child.”

In the former case the court, in the opinion, page 136, say:

“It is reasonable to presume that the testator had in view the disposition which the law makes of intestate estates.”

And again, on the same page, the writer of the opinion uses these words:

“That is to say, in case of the death of one of his children, his share was not to go to the survivors, but to be considered as if inherited by the heir of the deceased.”

The will of Dennis McCarthy shows no intention on his part to have the shares of his children pass as they would under the laws governing intestate estates. On the contrary, the will clearly shows an intention to change such devolution, and the share of a deceased child passes to the “heirs of the body.” The “heirs of the body” of the children do not inherit from the parent, but are by the will substituted for the parent. So if they take any estate, they take by the will of the grandfather, not by inheritance from their parent. While the words “heirs of the body” are usually construed as words of limitation, they are here used as words of purchase. The estate which came to the grandchildren came by devise and not by inheritance.

Counsel for Frances E. and Alma H. McCarthy, two of the children who signed the deed and mortgage but survived their mother, contend that their conveyances pass only a determinable fee, that the language of those instruments is not sufficient to pass to the defendant, Hansel, the indefeasible title which they acquired upon the death of the widow of Dennis McCarthy, and that they are not estopped to dispute the claims of such defendant.

1916.]

Hocking County.

The grantors in the deed to Hansel and in the mortgage through which he derived his title covenanted that they are "the true and lawful owners of said premises and have full power to convey the same," etc. It is contended that the words "owners of said premises" are not equivalent to "seized in fee" of said premises, and that "the children owned determinable fees by operation of law; these they conveyed, and these they warranted, and nothing more."

No doubt the meaning of the word "owner" depends upon the connection in which it is used, and may or may not mean one who holds the fee simple or highest estate, as held in *Baltimore & Ohio Rd. Co. v. Walker*, 45 Ohio St., 577, 585. But what does it mean in the covenants referred to? As applied to land it usually denotes a fee simple title.

In *Irvine v. Irvine*, 9 Wall., 617, 19 L. Ed., 800, the first paragraph of the syllabus reads: "When one makes a deed of land covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition enures to the grantee on the principle of estoppel."

The deed recited that the grantor was "well seized in fee, and had good right to sell and convey in fee." The federal Supreme Court treated that language as equivalent to the word "owner."

See also, *Coombs v. People*, 198 Ill., 586, 64 N. E. Rep., 1056; *Wright v. Bennett*, 4 Ill. (3 Scamm.), 258; *The Ill. Mut. Fire Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. (1 Gilm.), 236; *Jarrot v. Vaughn*, 7 Ill. (2 Gilm.), 132; *Whiteside v. Divers*, 5 Ill. (4 Scamm.), 336; *Hadlock v. Hadlock*, 22 Ill., 384; *McFeters v. Pierson et al*, 15 Colo., 201, 24 Pac. Rep., 1076, 22 Am. St. Rep., 388; Bouvier's Law Dictionary.

The defendants, Frances E. and Alma H. McCarthy, are estopped by the covenants in their conveyances to claim any estate in the premises devised to them by their father.

Judgment accordingly.

WALTERS, J., and MERRIMAN, J., concur.

DETERMINATION OF THE AMOUNT DUE FROM A COMPENSATED SURETY COMPANY ON A BUILDING CONTRACT.

Court of Appeals for Fayette County.

SOUTHERN SURETY COMPANY v. MASONIC TEMPLE COMPANY OF WASHINGTON COURT HOUSE.

Decided, November 11, 1915.

Default Under a Building Contract—Compensated Surety Not Released by Minor Changes in Building Plans Made to Conform with State Regulations—Nor by Excessive Progress Estimates by Architect, When—Loans to Contractor for Purchase of Material—Notice to Surety as to Defaults—Evidence.

1. Changes of a minor character in the building plans made to conform the building to state regulations, reported to the agent of the surety company during the progress of the work and not objected to by him, do not release the surety guaranteeing performance of the building contract by the contractor.
2. Where the building contractor delegates to an architect authority to make progress estimates, the payment of such estimates made by such architect which are regular upon their face, but shown by extrinsic evidence to be in excess of the amount fixed in the contract as the basis for the architect certificate, does not, in the absence of fraud or collusion, release the surety upon the contractor's bond; nor, in the absence of collusion or bad faith, is the owner bound to give notice to the surety of the fact that such estimates are actually in excess of the stipulated basis.
3. Loans to the contractor made to enable him to obtain material and upon the agreement that such loans are to be repaid out of the estimates when made, do not release the surety upon the contractor's bond.
4. Failure of owner to notify the surety of minor defaults will not bar recovery upon the surety's bond for other and substantial defaults of which the surety was duly notified.
5. The certificate of the architect as to damages is not rendered incompetent as evidence nor invalid by the inclusion therein of the statement that it covers matters "brought to our notice" and that it was made partly "in view of sworn statements" of the agent of the owner.

1916.]

Fayette County.

O. L. Rider, for plaintiff in error.

John Logan and *E. L. Bush*, contra.

ALLREAD, J.

The Masonic Temple Company brought suit in the court of common pleas against E. E. Bope as principal and the Southern Surety Company as surety upon a bond for the performance of a building contract entered into by Bope with the Masonic Temple Company for the construction of a mercantile and lodge building in Washington Court House.

Bope defaulted, the surety company declined to complete the work and the temple company thereupon completed the building. The action is for the loss, including damages for delay.

The temple company recovered a verdict and judgment for \$9,078.14. The judgment is brought here for review upon petition in error.

The defenses chiefly relied upon by the surety company are:

1. Change in the building contract subsequent to the giving of the bond and without the knowledge or consent of the surety.

2. Payment of estimates based upon full amount instead of ninety per cent. of wrought and fifty per cent. of unwrought material.

3. Advance payments to contractor.

4. Failure to notify surety company of prior defaults of contractor.

5. Insufficiency of evidence to support damages for delay.

Preliminary to the general consideration of the defenses it may be stated that the rule of *strictissimi juris* is not to be applied in all its latitude to cases of compensated sureties, but the surety's contract "should receive a reasonable construction in order to carry out the presumed intention of the parties as expressed by the language used." *Bryant v. The American Bonding Co.*, 77 Ohio St., 90.

1. The changes in the plans of the building complained of were largely if not wholly made at the order of the state inspector. They did not change substantially the building, but were intended to conform the same to state regulations. The original plans included a public hall. The parties were pre-

sumed as a matter of law to contract with reference to the state inspection laws and to contemplate that changes of a minor character might be ordered. Besides, the testimony shows that shortly thereafter, and before any substantial part of the changes were constructed, Mr. Smith, vice-president of the surety company, was notified of the changes ordered and made no objections thereto. This was supplemented by additional evidence to the effect that after Bope's default the list of incompletions was furnished Mr. Smith and no objections were made as to them. The temple company then proceeded to complete the building with the changes incorporated.

It is also objected in this connection that these changes, in order to be binding on the surety, should also have been approved by the architect and prices agreed upon or fixed by arbitration. Whatever might have been the effect if either Bope or the temple company had objected, we are not called upon to decide. Both parties to the construction contract accepted these changes, and by acquiescence of all parties the additional cost was fixed by the architect under other provisions of the contract. In view of these circumstances we do not consider that such changes constitute a defense to the surety company's liability.

2. The building contract provided that payments to the contractor should be made "only upon certificates of the architects, as follows: based upon an allowance of ninety per cent. of material and labor actually in place in the building, and fifty per cent. of the material on ground. * * * And all payments shall be due when certificates for the same are issued."

It appears that the architect did not follow this provision strictly, and it is claimed that estimates based upon the full amount of material and work were given from time to time and paid by the temple company.

The estimates of the architect were regular in form and did not show upon their face that they were made upon an irregular basis. There is no claim of collusion or fraud upon the part of the temple company, but it is claimed that the temple company knew of the basis upon which the certificates were made.

This is denied and there may be some doubt as to proof of this fact, but in view of the special instructions given by the

1916.]

Fayette County.

court to the jury we may ignore the conflict of evidence upon this point and assume that there was some evidence upon which the jury might have found that the temple company had knowledge of the actual basis of the certificates. This, therefore, brings us to the question of whether the temple company was bound to revise or review the estimates of the contractor before making payment.

Counsel for the temple company italicize the concluding sentence that "All payments shall be due when certificates for the same are issued." Counsel for the surety company emphasize the clause providing that payment shall be made only upon certificates founded upon the stipulated percentage. This question is not free from difficulty and is one upon which the authorities in other states are in conflict. We feel it to be our duty, in view of the conflict of authority, to adopt such construction as would seem to be just and reasonable and best calculated to preserve and carry out the apparent intention of the parties to the contract.

It must be kept in mind that the architect was not the agent of the temple company, nor was he in any manner under its control. The architect was selected by the terms of the contract as an independent authority or umpire. If the estimates were too low the contractor had no right to object, and if they were too high the owner was equally bound. So long as there was no fraud or collusion we think the temple company was justified in making payments strictly in conformity with the architect's estimates. Many of the authorities cited by learned counsel for the surety company are cases where the obligation to make payments only upon certain percentages of work and material was placed upon the owner and not upon an independent architect.

From the spirit and general import of the contract we think that both parties expected to be bound in the progress of the work by the architect's estimates.

The surety company contends, and not without a show of reason, that in its bond it reserved a contingent interest in the retained percentages and deferred payments, and also the right to notice of final payment. This condition of the bond would be quite pertinent in a case where the owner had not followed

strictly the progress estimates of the architect and had paid amounts in excess of the architect's certificates, but we think it does not apply where the owner is proceeding strictly according to the architect's estimates.

The surety company, being a compensated surety, is presumed to have fashioned the conditions of its bond, and if it was desired to hold the owner to a stricter liability as to retained percentages and deferred payments such liability should have been definitely stated.

3. All the evidence offered tends to show that the advances made to the contractor were made as loans and not as advance payments. It is true that the understanding was that the loans were to be repaid out of estimates when available for that purpose. While there is conflict upon this subject, still we think the weight of authority sustains the view that such collateral loans did not vitiate the bond nor avoid liability thereon. *Stuts v. Strayer*, 60 Ohio St., 384.

It is contended that this question is eliminated by the admission of the reply that payments were made from time to time to Bope, but nevertheless we think that it was competent to show that the advances were loans and that the payments were not actually made until the loans were surrendered and the credit given upon the estimates.

It is also contended, both with respect to the advances and with respect to the payments upon the estimates, that the temple company was bound in justice to notify the surety company of the true basis of the estimates and of the advance payments and that the failure to notify them would be so prejudicial as to have the effect of discharging the surety.

The case of *Koppitz-Melchers Brewing Co. v. Schultz et al*, 68 Ohio St., 407, is cited, but it will be observed in considering that case that the obligee of the surety bond had expressly bound himself not to make the third shipment until the first had been paid for. That was an obligation upon which the surety had a right to rely. Here there was no such contract obligation on the part of the temple company. Both parties had agreed to submit the matter of estimates to the architect, and neither party, in

1916.]

Fayette County.

the absence of fraud or collusion, would be bound to keep the other advised as to the action of the architect in the absence of some stipulation to that effect.

4. The bond of the surety company provided for notice of default of the contractor and that the failure to give such notice would relieve the surety. Reading both conditions of the surety's bond, we think the default contemplated is one terminating the building contract or is one upon which the liability is based. It would be unreasonable to extend the letter of the first condition of the bond to every technical default or slight variance from the principal contract. To so hold would make surety bonds of little consequence.

5. We think the certificate of the architect was competent evidence on the subject of damages. The statement in the architect's certificate that it covered matters "brought to our notice" and was made partly in view of the sworn statements of E. L. Bush, did not affect its competency. These merely show the basis of the certificate and the evidence upon which the architect acted.

The case at bar is, in our judgment, distinguished from the case of *Spencer v. Duplan Silk Co.*, 112 Fed. Rep., 638.

It is also contended that the stipulated damages for delay amounted to a penalty and not liquidated damages. We think *prima facie* they should be considered liquidated damages and the burden was upon the surety company to impeach the *prima facie* effect of the contract.

It is also urged that the trial court erred in placing the burden of proof upon the surety company. In view of the averment of the petition as to the architect's certificate and of the failure of the answer to deny the giving of this certificate, a *prima facie* case was made out in favor of the temple company and the burden of proof under the pleadings was upon the defendant to impeach that certificate.

There are other assignments of error, but upon the whole record we have reached the conclusion that there is no prejudicial error.

Judgment affirmed.

FERNEDING, J., and KUNKLE, J., concur.

strictly the progress estimates of the architect and had paid amounts in excess of the architect's certificates, but we think it does not apply where the owner is proceeding strictly according to the architect's estimates.

The surety company, being a compensated surety, is presumed to have fashioned the conditions of its bond, and if it was desired to hold the owner to a stricter liability as to retained percentages and deferred payments such liability should have been definitely stated.

3. All the evidence offered tends to show that the advances made to the contractor were made as loans and not as advance payments. It is true that the understanding was that the loans were to be repaid out of estimates when available for that purpose. While there is conflict upon this subject, still we think the weight of authority sustains the view that such collateral loans did not vitiate the bond nor avoid liability thereon. *Stuts v. Strayer*, 60 Ohio St., 384.

It is contended that this question is eliminated by the admission of the reply that payments were made from time to time to Bope, but nevertheless we think that it was competent to show that the advances were loans and that the payments were not actually made until the loans were surrendered and the credit given upon the estimates.

It is also contended, both with respect to the advances and with respect to the payments upon the estimates, that the temple company was bound in justice to notify the surety company of the true basis of the estimates and of the advance payments and that the failure to notify them would be so prejudicial as to have the effect of discharging the surety.

The case of *Koppitz-Melchers Brewing Co. v. Schultz et al*, 68 Ohio St., 407, is cited, but it will be observed in considering that case that the obligee of the surety bond had expressly bound himself not to make the third shipment until the first had been paid for. That was an obligation upon which the surety had a right to rely. Here there was no such contract obligation on the part of the temple company. Both parties had agreed to submit the matter of estimates to the architect, and neither party, in

1916.]

Fayette County.

the absence of fraud or collusion, would be bound to keep the other advised as to the action of the architect in the absence of some stipulation to that effect.

4. The bond of the surety company provided for notice of default of the contractor and that the failure to give such notice would relieve the surety. Reading both conditions of the surety's bond, we think the default contemplated is one terminating the building contract or is one upon which the liability is based. It would be unreasonable to extend the letter of the first condition of the bond to every technical default or slight variance from the principal contract. To so hold would make surety bonds of little consequence.

5. We think the certificate of the architect was competent evidence on the subject of damages. The statement in the architect's certificate that it covered matters "brought to our notice" and was made partly in view of the sworn statements of E. L. Bush, did not affect its competency. These merely show the basis of the certificate and the evidence upon which the architect acted.

The case at bar is, in our judgment, distinguished from the case of *Spencer v. Duplan Silk Co.*, 112 Fed. Rep., 638.

It is also contended that the stipulated damages for delay amounted to a penalty and not liquidated damages. We think *prima facie* they should be considered liquidated damages and the burden was upon the surety company to impeach the *prima facie* effect of the contract.

It is also urged that the trial court erred in placing the burden of proof upon the surety company. In view of the averment of the petition as to the architect's certificate and of the failure of the answer to deny the giving of this certificate, a *prima facie* case was made out in favor of the temple company and the burden of proof under the pleadings was upon the defendant to impeach that certificate.

There are other assignments of error, but upon the whole record we have reached the conclusion that there is no prejudicial error.

Judgment affirmed.

FERNEDING, J., and KUNKLE, J., concur.

**ALLOWANCES TO THE EXECUTOR UNDER A WILL WHICH
WAS SET ASIDE.**

Court of Appeals for Wood County.

THURSTON V. LUDWIG ET AL.

Decided, November 19, 1915.

*Executor—Not Entitled to Expenses in Defending a Will Which Was Set
Aside—Apportionment of Commissions Between an Executor Named
in the Will and His Successor in Office.*

1. An executor is not entitled to charge the estate for the expense of conducting a defense of the will where it is adjudged invalid, notwithstanding the executor is, by virtue of Section 12080, General Code, a necessary party.
2. In case of the resignation of an executor after he has collected but not disbursed the assets of the estate, and the appointment of a successor to complete the administration, the commissions provided for by Section 10837, General Code, for all ordinary services, should be apportioned by the probate court between the two in accordance with the services performed by each.

Harrington & Dunn, for plaintiff in error.

E. M. Fries, for defendants in error.

RICHARDS, J.

Isaac Ludwig died in February, 1906, leaving a written instrument which was afterwards probated as his last will and testament and in which he named as his executor the plaintiff in error, Azor Thurston. Mr. Thurston qualified as executor and served in that capacity for seven or eight years. During about seven years of this period litigation was pending which involved a contest of the will of Isaac Ludwig, deceased, the same being finally determined in the Supreme Court against the validity of the will. After this written instrument was held not to be the valid last will and testament of Isaac Ludwig, the executor named therein, Azor Thurston, resigned and thereupon the defendant, E. M. Fries, was appointed to administer the estate. The estate at the death of Isaac Ludwig amounted to about

1916.]

Wood County.

\$10,500, most of which was in bank or in cash, and of this sum the executor, with the approval of the probate court, invested \$8,840 in stock of a national bank. This stock since the investment was made has become greatly enhanced in value.

Upon the resignation of the executor his accounts were filed in the probate court and on a settlement of the same that court refused to allow disbursements made by him in the defense of the will of Isaac Ludwig, deceased, the items, specifically, being attorneys' fees and the amount paid for a bill of exceptions. The probate court further held that the executor was not entitled to any compensation upon moneys received by him which had not been actually disbursed but remained on hand and were paid over to his successor. From this decision of the probate court Azor Thurston appealed to the court of common pleas, and in that court, on a trial of the case, the same judgment was entered as had been entered in the probate court, and from the judgment of the common pleas court this proceeding in error is brought.

The defendants, so far as the disallowance of disbursements made for the unsuccessful defense of the will are concerned, rely on *Executors of Andrews v. His Administrators*, 7 Ohio St., 143, where it was directly held that an executor would not be entitled to charge the estate with the expense of maintaining an unsuccessful defense of a will. On the other hand, it is insisted by the plaintiff that at the time of the decision rendered in the case above cited there was no requirement that the executor should be made a party defendant, while now, by virtue of the provisions of the statute (Section 12080, General Code), he is a necessary party in an action to contest a will. The Supreme Court, however, in the case above cited state, on page 151, that it has been the general and perhaps uniform practice to make executors parties defendant, and they further say that, granting the propriety, and even the necessity, of this practice, it does not follow that the executor is bound to take upon himself the burden of the contest.

In *McArthur v. Scott*, 113 U. S., 340, the Supreme Court of the United States had under consideration a case coming from

the Southern District of Ohio and involving the contest of a will which became effective before there was any statutory requirement making the executor a necessary party, and that court, speaking through Mr. Justice Gray, say, on page 404:

“Executors and trustees, appointed by the testator to perform the trusts of the will and to protect the interests of his beneficiaries, are as necessary parties to a proceeding to annul a probate, as the heirs at law are to a suit to establish the validity of a will. And upon a review of the cases no precedent has been found, either in a court of probate or in a court of chancery, in which a decree disallowing a will, rendered in a suit brought to set it aside, or to assert an adverse title in the estate, without making such executors, or an administrator with the will annexed, a party to the suit, has been held binding upon persons not before the court.”

We hold that the principle announced by the Supreme Court of Ohio in the Andrews case, *supra*, is still applicable and that no error was committed in the courts below in refusing to allow the executor for amounts expended in the unsuccessful defense of the will of Isaac Ludwig, deceased.

The remaining question concerns the statutory allowance of an executor for the ordinary services rendered by him as such executor. The amount to be allowed depends upon a construction of Section 10837, General Code, which provides, in substance, that executors may be allowed commissions upon the amount of the personal estate collected and accounted for by them, which sum shall be in full compensation for all their ordinary services, the amounts fixed by the statute being six per cent. for the first thousand dollars, four per cent. for the next four thousand dollars and two per cent. for all in excess of five thousand dollars. The probate court and the court of common pleas held that the executor could not be allowed, under this statute, any compensation for services except upon amounts not only collected by him but accounted for, and they construed the expression “accounted for” as disbursed in the administration of the estate. It is apparent from a fair construction of the statute that the amounts authorized to be allowed thereby are intended to be for all ordinary services rendered in the

1916.]

Wood County.

full and complete administration of the estate, and in that sense the expression "accounted for" does not mean simply entered upon the books and paid over to the successor in office, but it means disbursed in the administration of the estate. It will be noticed that the statute does not require the allowance of the percentages named therein, but provides that those commissions *may* be allowed. The trial court, construing the expression "accounted for" to mean as above stated, reached the conclusion that no compensation whatever could be allowed for amounts which had been collected but not expended in the administration of the estate. If this construction were to be adopted and the executor who has collected the funds of the estate but not disbursed them, should for that reason be deprived of an allowance for ordinary services because he had not accounted for the sums collected, it would, by parity of reasoning, follow that his successor in office should also be refused an allowance because *he* would not have *collected* the sums and therefore would not come literally within the provisions of the statute. This construction would, of course, be unjust to those who serve in the capacity of executors or administrators in the settlement of estates. On the other hand, to hold that an executor who collects but does not account for or disburse in the administration of the estate the funds so collected should be allowed the full statutory compensation, and then on the same reasoning to pay the full compensation to his successor, would work an injustice to the estate. In the opinion of the court neither of these constructions is the true one to be applied to this statute and neither construction is a fair interpretation of the statute. A better interpretation is that the probate court in fixing the compensation for all ordinary services rendered in the settlement of the estate, under this statute, has authority, where an executor has collected but not accounted for—that is, disbursed—the funds so collected in the administration of the estate, to allow a reasonable amount in payment of such services, within the limitation contained in the statute, and of course it would follow that the successor in office of such executor who does not collect but who accounts for and disburses the funds in

the administration of the estate would be entitled to the remaining portion of the compensation.

The statute of the state of New York providing for allowances in such cases is made by its terms to cover "receiving and paying out all sums of money," which means the same as the Ohio statute, which allows compensation for collecting and accounting for the moneys of the estate. Under this statute it was held *In re Accounting of Mason et al*, 98 N. Y., 527, that one-half of the statutory amount should be allowed where the sums had been collected but not paid out.

In *McAlpin et al v. Potter et al*, 126 N. Y., 285, 290, the court use the following language:

"A further question is raised over the allowance to the executors of half commissions for receiving the funds of the estate. The law allows a specific rate for 'receiving and paying out all sums of money.' The statute indicates no division of the commissions which should apportion one-half to the receiving and the balance to the paying out, though the courts have allowed it in proper cases. But the allowance here was premature. The bulk of the estate came to the executors already invested and in the form of securities which have not been turned into money. No law justifies the allowance of one-half commissions upon their estimated value in advance of their conversion into money or its equivalent. It was proper enough to allow one-half commissions upon all sums of money received, but until the securities become sums of money, either by conversion into cash or by their acceptance as cash by those entitled, the allowance is premature."

To the same effect is *In re Hurst's Estate et al*, 97 N. Y. Supp., 697. See also *In re Owen's Estate*, 32 Utah, 469. In this latter case, where the statute provided that an administrator should be allowed commissions on the amount of the estate accounted for by him, it was held that where an estate was administered by successive personal representatives compensation should be apportioned among them according to the services rendered. To the same effect is *In re Estate of Barley*, 47 Md., 555.

In view alike of reason and authority we hold that a fair interpretation of Section 10837, General Code, requires that in a case where an executor has resigned after collecting, but not disbursing, the funds of the estate in the administration thereof,

1916.]

Cuyahoga County.

and a successor is appointed to complete the administration of the estate, the commissions allowed for all ordinary services rendered by them should be apportioned by the court between the two in accordance with the services performed by each.

It results that the judgment must be reversed and the cause remanded to the court of common pleas for further proceedings in accordance with this opinion.

Judgment reversed.

CHITTENDEN, J., and KINKADE, J., concur.

**NEGLIGENCE OF A MUNICIPALITY IN PERFORMING A
MINISTERIAL DUTY.**

Circuit Court of Cuyahoga County.

ETZENSPERGER & ORSCHAK V. CITY OF CLEVELAND.

Decided, February 11, 1902.

Municipal Corporations Liable for Negligence of Officers when Acting in Ministerial Capacity—Liable for Negligence in Constructing a Public Building.

1. Though municipal corporations are not liable for injuries caused by the negligence of officers while acting in a governmental, legislative or judicial capacity, they are liable to the same extent as private corporations where the injury is caused by negligence in performing some duty which is purely ministerial.
2. While the preparation and adoption of plans for a public building are the exercise of governmental and judicial functions, the construction of the building is ministerial, and where it is so negligently done that the building collapses upon the property of another, the municipality is liable in damages.

Poppleton, Billman & Billman, for plaintiff in error.

Beacon, Baker, Gage & Carey, contra.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Error to court of common pleas.

Error is prosecuted in this court to reverse a judgment of the court of common pleas in sustaining a demurrer to the petition.

The petition charges that the city and one Francis Campbell in the winter of 1900 were building an engine-house for the use of the fire department of the city, at No. 36 Hill street in said

city. That they so negligently, carelessly and recklessly built and constructed the south wall thereof, which was composed of stone, brick and mortar, that a part of the same, on or about the 3d day of March, 1901, fell down upon the property of the plaintiff which was next to and adjoining said engine-house, and completely demolished and destroyed the same and the contents thereof, to the plaintiff's damages in the sum of about three thousand dollars.

The petition specifies the particular acts of negligence relied on.

On behalf of the city a demurrer was filed to this petition which was sustained and judgment rendered in favor of the city.

It seems to be well settled that a municipal corporation, acting in its governmental, legislative or judicial capacity, is not responsible for injury caused to person or property, by its negligence in the performance of such duties. Whether or not the municipality will exercise such powers is a matter of discretion with the proper officers or board charged with such duty, and such discretion can not be controlled by the courts. But, in the performance of duties which are purely ministerial, a municipal corporation is liable for its negligence in the same manner and to the same extent as private corporations.

We hold that the adoption of plans for and the direction to construct a public building, are acts judicial and governmental and included in the class first named. That the prosecution of the work in the construction of such building in accordance with the plans and determination of the municipality, is purely ministerial, and the duty rests upon the municipality to see that the work is done with ordinary care, and if injury to others is caused by the negligence of the municipality in the performance of such duty, a liability attaches. The petition, then, brings this case within this latter rule and states a cause of action.

The fact that the building is constructed for the use of the fire department, does not change the rule, as above stated.

For error in sustaining the demurrer to the petition and rendering judgment in favor of the defendant, the judgment of the court of common pleas is reversed and the cause remanded for further proceedings.

1916.]

Hamilton County.

**PENALTIES FOR REQUIRING EMPLOYEES TO JOIN RELIEF
ASSOCIATION AND WAIVE DAMAGES
FOR INJURIES.**

Court of Appeals for Hamilton County.

**JOSEPH F. BAILEY V. THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY; AND THREE OTHER CASES.**

Decided, March 18, 1916.

*Constitutional Law—Validity of the Statute Fixing a Penalty—For
Requiring Employees to Join a Relief Association—Petition for
Recovery of Such Penalty Held Good Against Demurrer.*

Sections 9012-13-14, providing that it shall be unlawful for any corporation to compel employees to join an association, or to withhold any part of their wages for payment of dues in such association, and prohibiting the demanding or receiving of waivers from employees of any right to damages in case of personal injury or death during the course of such employment, and declaring agreements of that character void, are not in contravention of either the Federal or the state Constitution; and an action lies to recover a penalty for requiring an employee to do the things in these statutes forbidden.

*Albert D. Alcorn and Robert S. Alcorn, for plaintiffs in error.
Harmon, Colston, Goldsmith & Hoadly, contra.*

GORMAN, J.

The above four proceedings in error present the same questions of law, and they were argued and submitted to the court as one cause involving the same or identical facts, from which facts the same conclusions of law should be drawn.

Each of the plaintiffs in error commenced an action against the defendant in error in the common pleas court under favor of Sections 9012, 9013 and 9014, General Code, to recover a penalty for withholding from their wages certain sums each month to be applied in payment of their dues in the relief department of the defendant in error.

It will be sufficient for the purposes of the court to refer to the petition of Joseph Bailey. He sets up thirteen causes of action, all of which, except as to dates, are identical. In his first cause of action he sets up the corporate existence of the defendant, and that it was organized to operate a railroad in Ohio and other states, and he then avers that:

“Plaintiff, during the month of April, 1913, was employed by the defendant as switchman. Defendant required him, as a condition of his employment, to join its relief department. Said association or department, by its rules and regulations, required him to agree to surrender or waive a right of damages against the defendant for personal injuries, and to surrender or waive his rights in said department or association, in case he asserted his claim for damages against defendant for personal injuries.

“During April, 1913, the defendant unlawfully and illegally withheld from plaintiff’s salary as such employee the sum of four (\$4) dollars for the payment of dues in said department or association, contrary to the provisions of Section 9012, General Code of Ohio, to the plaintiff’s damage in the sum of five hundred (\$500) dollars.”

The trial court sustained a demurrer to this cause of action and to the petition setting up the other twelve similar causes of action, on the ground that no cause of action was stated. He also sustained like demurrers to the like petitions setting up like causes of action by the other plaintiffs in error.

The question presented to this court is the correctness of these rulings.

The sections of the code under which plaintiffs seek to recover are 9012, G. C., 9013, G. C., and 9014, G. C. Section 9012, G. C., in part reads as follows:

“No corporation directly or indirectly shall compel or require an employee to join any company or association whatsoever, or withhold any part of an employee’s wages or his salary for the payment of dues or assessments in any society or organization, or demand or require either as a condition precedent to securing employment or being employed,” etc.

Section 9013 reads as follows:

1916.]

Hamilton County.

“No railroad company, insurance society or association or other person shall demand, accept or enter into an agreement or stipulation with a person about to enter or in the employ of a railroad company, whereby he stipulates or agrees to surrender or waive any right to damage against a railroad company, thereafter arising for personal injury, or death, or whereby he agrees to surrender or waive in case he asserts such right, any other right.”

Section 9014, General Code, in substance provides that all rules, regulations, stipulations and agreements declared unlawful by the next three preceding sections are void. A corporation violating, or aiding or abetting the violation of either of such sections shall for each offense forfeit and pay to the person thus wronged or deprived of his rights thereunder not less than fifty nor more more than five hundred dollars, to be recovered by a civil action.

The demurrers for the purposes of the cases admit the truth of the averments set out in the various causes of action of the several petitions; and the sole question to be determined, therefore, is the right of the plaintiffs to recover on the admitted facts of the petitions. This in turn involves the constitutionality of these sections of the General Code. If these sections are valid constitutional expressions of the law-making body, then clearly the petitions disclose a violation of these Sections (9012 and 9013), and by the express terms of Section 9014 the defendant company, by the act of violating these sections or either of them, became liable to the injured employee in a civil action, for the penalty fixed by the statute. On the other hand, if these sections are invalid because they are in contravention of any provision of the state or Federal Constitution, then no cause of action exists in favor of plaintiffs and the demurrers were properly sustained.

It is claimed by counsel for defendant in error that these sections of our code are violative of the Fourteenth Amendment of the Federal Constitution, in that they impair the rights of citizens of Ohio to contract fully and freely concerning their own labor and the fruits thereof, and therefore deprives them of liberty without due process of law.

Before considering this question we shall take up the claim of defendant in error that the relief department of the defendant, which is attacked in the petition in these cases, is a valid and lawful organization. The following cases are cited in support of this claim, in which cases it is contended that this organization has been held to be a valid and lawful one: *P., C., C. & St. L. Ry. Co. v. Cox*, 55 O. S., 497; *State, ex rel Sheets, v. P., C., C. & St. L. Ry. Co.*, 68 O. S., 9; *Penn. Co. v. State, ex rel Crainger*, 69 O. S., 536; *State, ex rel Simpson, v. B. & O. R. R. Co.*, 88 O. S., 540.

The case of *P., C., C. & St. L. Ry. Co. v. Cox, supra*, was an action to recover damages for personal injuries claimed to have been sustained by Cox by reason of the negligence of the company. The company set up as a defense that its relief department was a voluntary association created for the purpose of managing a fund known as "the relief fund," and that said relief fund was formed by voluntary contributions from employees, and appropriations when necessary to make up the deficiencies, all for the benefit of the employees who may be members thereof; that under the regulations of said relief department no employee is required to become a member of said relief department or to contribute to said fund, and that membership therein is purely voluntary, and an employee may withdraw therefrom at pleasure; that payments by the employees to the support of said relief fund were voluntary. A demurrer to this defense was overruled, and this ruling was sustained by the Supreme Court. In deciding the case the court, through Spear, J., on pages 512 and 513, says:

"We think the contract set up in the answer is not fairly within the inhibitory terms of the act, when reasonably construed, and this conclusion makes it unnecessary to consider the unconstitutionality of the statute."

On pages 514 and 515, in speaking of the character of the relief department, and of the effect of the rules and regulations thereof on the members, this language is used:

1916.]

Hamilton County.

“Nor is the contract a compulsory one. It is entered into voluntarily. If the employee conceives it to be for his interest to enter the relief class, he applies for the privilege; if not, he with like exercise of his own judgment stays out.”

It will therefore be seen that the constitutionality of these sections was not passed upon by the Supreme Court in this case; nor was the point decided that a relief department, whose rules required an employee, or one about to become an employee, of a railroad company to become a member of said relief department, is a legal or valid association. On the contrary, the kind of a relief department which the court was considering in this case was one which was purely voluntary and whose rules did not require or compel railroad employees to become members thereof, or compel them to contribute to the relief fund.

But the petition in the case before us avers that defendant required plaintiff, as a condition of his employment, to join its relief department, and that the rules of said department required him to agree to surrender or waive a right to damages against the defendant for personal injuries, and that the defendant unlawfully and illegally withheld from plaintiff's salary the sum of \$4 each month for the payment of dues in said relief department. The demurrer admits these averments to be true, and these requirements or exactions on the part of defendant company are the things prohibited by the statute, Sections 9012 and 9013, General Code. If the employee is not required or compelled to join the relief department but does so voluntarily, as was said in the Cox case, *supra*, then there is no violation of any statute; and therefore this case does not aid us in determining whether or not the demurrer to plaintiff's petition was properly sustained.

The case of *State, ex rel Sheets, v. P., C., C. & St. L. Ry. Co.*, 68 O. S., 9, was an action in *quo warranto* brought by the Attorney-General to inquire by what authority the defendant company was engaged in transacting the business of life and accident insurance whereby it insured its employees against sickness, accident and death through its relief department, and praying for a judgment of ouster. The findings of fact upon which the

case was submitted to the court shows that the defendant's relief department was entirely voluntary and confined to its employees, none of whom were required to become members thereof nor to pay dues thereto except voluntarily. The court found as a matter of law that such an association conducted as a voluntary relief department, where there was no compulsion or obligation on the part of the employees to join, was not illegal; nor were the acts of the defendant company in maintaining such a relief department *ultra vires* or contrary to public policy. But no question as to the constitutionality of the statute under which defendant company was maintaining said relief department was raised in that case, nor was there any question involved as to the legality of a *compulsory* relief department whose members were *required* or *compelled* to join, as a condition of their employment, by the defendant company whose employees wages were illegally taken to pay dues into said association. On page 33 the court says:

“Not a dollar of the fund ever belongs to the railway company, and it is made up primarily of a certain part of the wages of the employee retained for that purpose by his direction. * * * While an employee is not required to become a member, none but employees could do so. * * * Is this an insurance business? It is not held out to be such. * * * The members of the fund are volunteers.”

The case of *Pennsylvania Company v. State, ex rel Gallinger*, 69 O. S., 536, is an unreported case and decided on the authority of *P., C., C. & St. L. Ry. Co. v. Cox*, 55 O. S., 497, and *State, ex rel Sheets, v. P., C., C. & St. L. Ry. Co.*, 68 O. S., 9. Evidently from the title of the case and the reference to these two cases it was a case of *quo warranto* involving the same questions considered in the two cases cited. We can not speculate as to what questions were involved in this case, and can not see that the citation sheds any light on the questions under consideration.

The case of *State, ex rel Simpson, v. B. & O. R. R. Co.*, 88 O. S., 540, is another unreported case decided on the authority of the Cox case, 55 O. S., 597. This case would also, as appears

1916.]

Hamilton County.

from the printed record, seem to have been a *quo warranto* proceeding; but in the absence of a report of what was there decided we can not say that this decision has any application to the questions raised in the instant cases.

There remains to be considered the case of *Copeland v. B. & O. S. W. R. R. Co.*, No. 431 on the docket of this court, and cited by counsel for defendant in support of their contention that this decision is decisive of the questions involved in the cases under consideration. The Copeland case was brought by an employee of the defendant company to recover from the defendant all the moneys which he alleged he was compelled to pay, or which were compulsorily deducted from his wages by the defendant company as premiums for insurance in said defendant company against his own liability to injury or death. The total amount sought to be recovered was \$112.30, and included weekly items of \$3 extending over the period from January 15, 1911, to December 22, 1913. The theory upon which a recovery was sought in this case was that the defendant company had insured plaintiff against death or personal injury in consideration of the sums withheld each week from his wages, and that he was discharged by defendant from its employ against his will and thereby cut off from the benefits of said insurance, and that said discharge operated as a cancellation of his insurance. Plaintiff bottomed his right to recover these premiums compulsorily deducted from his wages under the rule laid down in *Insurance Co. v. Pottker*, 33 O. S., 49, the fourth paragraph of the syllabus of which is as follows:

“If in such case the company (insurance company) wrongfully declares the policy forfeited, and refuses to accept the premium when duly tendered, and to give the insured the customary renewal receipt evidencing the continued life of the policy, the assured is in equity entitled to demand a rescission of the contract and a return of the premiums paid thereon, with interest from the time of payment.”

No claim was made in that case that Sections 9012, 9013 and 9014, General Code, were unconstitutional and void, nor was this

question considered or decided by this court. It appeared to this court that Copeland was seeking to recover back sums of money voluntarily paid by him to the railroad company, under a claim that he had been compelled to pay the same.

The case of *State, ex rel Sheets, v. P., C., C. & St. L. Ry. Co.*, 68 O. S., 9, appeared to cover Copeland's case, and this court so stated in its opinion. There is no express provision of law warranting a recovery of money paid into the relief department of a railroad company whether paid voluntarily or involuntarily. The remedy given by the statute, Section 9014, General Code, appears to be the recovery of a penalty of from \$50 to \$500 for a violation of the statutes which forbid employees of a railroad company being required to join relief associations or withholding a part of their wages against their will. It appears further that during the entire time that Copeland paid into the relief association of the railroad company he received the benefits of an insurance against injuries or death, and this court felt that under the circumstances he had received value for the dues paid in by him.

The trial court in the cases under consideration was warranted in sustaining the demurrers to the petitions on the language employed in the decision in the Copeland case. But this court did not intend in the Copeland case to hold Sections 9012 and 9014 unconstitutional, nor was its decision in that case based on such grounds. We deem it to be fair to the trial court to say that he was no doubt misled by the language in the Copeland case, in deciding the case before us.

As to the question of the constitutionality of the sections of the General Code, raised in these cases, we are of the opinion that it was within the province and power of the Legislature to prescribe the regulations and conditions under which a railroad company, a corporation doing business in Ohio, might conduct and operate its relief departments, and to define the kind and character of relief departments or associations which such corporations could maintain. Courts must presume all statutes passed by the law-making body to be valid; and an act of the Legislature should never be held invalid or unconstitutional, unless clearly or manifestly so. These sections do not deprive

1916.]

Hamilton County.

either the railroad company or any of its employees of the right to freely and voluntarily contract with one another with reference to the employment of the employees or their rights to benefits in the relief departments. The inhibition is to requiring or compelling employees to join relief departments or to submit to compulsory deductions from their wages as conditions of employment or continuance in employment.

The statutes seek to prevent the coercion of the employees. Voluntary payments of parts of their wages, or voluntarily seeking to be admitted to membership in the relief departments is not prohibited. In all the cases decided by the courts of this state, in so far as we have found, upholding the railroad relief departments, the associations were either admitted or found by the court to be purely voluntary and not compulsory.

In the case of *State, ex rel Simpson, v. Pennsylvania Co. and B. & O. R. R. Co.*, 13 C.C.(N.S.), 37, the court said on page 39:

“It is further contended as a second ground of demurrer that the amended petition does not state facts sufficient to constitute a cause of action on the ground that Section 9010, General Code, as amended April 7, 1908, is unconstitutional and void.

“We are of the opinion that it is entirely competent for the Legislature to place proper restrictions upon a corporation, such as a railroad company, in respect to its conduct and operation, and the character of relief associations that it maintains or assists in maintaining, and that it is not violative of any of the provisions of the Constitution.”

Section 9010, General Code, prohibits any railroad company from establishing, maintaining or assisting in maintaining

“a relief association or society, the rules or by-laws of which require of a person or employee becoming a member thereof to enter into an agreement or stipulation, directly or indirectly, whereby he stipulates or agrees to surrender or waive a right of damages against any railroad company for personal injuries or death, or to surrender or waive in case he asserts such claim for damages, any right whatever.”

There would seem to be no good reason for holding that if such a statute is constitutional and valid, then Sections 9012,

General Code, and 9014, General Code, are also valid enactments, inasmuch as these sections prohibit any railroad company from directly or indirectly compelling or requiring an employee to join any association whatsoever or to withhold any part of his wages, and imposing a penalty of from \$50 to \$500 for a violation of the sections.

In the case of *Shaver v. Pennsylvania Co.*, 71 Fed., 931, Judge Ricks of the United States Federal Court for the Northern District of Ohio held that Section 3270, Revised Statutes, a part of which section is now 9012, General Code, is unconstitutional and void because violative of Article II, Section 26 of the Constitution, and of the Fourteenth Amendment of the Federal Constitution; but the facts show that the relief association in that case was a voluntary one and in no way compulsory.

In the case of *Pierce v. VanDusen*, 118 Fed., 693, decided by the United States Circuit Court of Appeals for this Sixth District, Justices Harlan, Taft and Lurton, sitting, the court in commenting on this decision of Judge Ricks in the Shaver case, says on pages 702-703:

“It is quite clear from an examination of Judge Rick’s opinion that he intended to decide nothing more—indeed, the case under his view of the statute required nothing more to be decided—than that the part of the act of 1890 relating to contracts or agreements whereby a right to damages against a railroad company, arising from personal injuries or death, was surrendered or waived when the employee became a member of the relief association referred to, was unconstitutional, as depriving the employees of railroad corporations of their liberty without due process of law. He had no occasion in the case before him to consider the validity of the third section of that act.”

A perusal of this decision in 118 Fed., *supra*, satisfies us that the United States Circuit Court of Appeals did not approve of Judge Ricks’ holding in the Shaver case, and that what he said in that case as to the unconstitutionality of Section 3270, Revised Statutes, was to be considered as *obiter dicta*.

Penalty statutes similar to Section 9014, General Code, have been frequently upheld as valid and reasonable legislation. *Railroad Co. v. Cook*, 37 O. S., 265; *D., T. & I. R. R. Co. v. State*,

1916.]

Hamilton County.

82 O. S., 60; *Seaboard Air Line v. Seegers*, 207 U. S., 73; *Western Un. Tel. Co. v. James*, 162 U. S., 650.

Indeed, in the case of *C., B. & Q. R. R. Co. v. McGuire*, 219 U. S., 549, the court held that McGuire, a brakeman who after being injured accepted his benefits as a member of the relief association to the amount of \$822, was not thereby barred to maintain an action against the railroad company for the injuries received. The law of Iowa as to relief associations set up in that case to defeat McGuire's recovery, was similar to the Ohio statutes. In the fourth paragraph of the syllabus of the case the court says:

"A state has power to prohibit contracts limiting liability for injuries, made in advance of the injuries, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract. Such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment; so held as to the Iowa statute relative to employees of railway companies."

Under the employer's liability acts of 1906 and 1908 passed by Congress, there is a provision that the acceptance of benefits from the relief department does not bar an injured employee from recovering, even though he agrees to waive his claim for damages, if he accepts the benefit for any injuries received after the agreement is entered into. This provision of these acts has been upheld as a valid exercise of the legislative power. *Phil., Bal. & Wash. R. R. Co. v. Schubert*, 224 U. S., 603; *P., C., C. & St. L. Ry. Co. v. Sheets*, 15 C.C.(N.S.), 305.

In the case in 224 U. S., *supra*, the court says:

"Congress has power to enforce the regulations validly prescribed by the employer's liability act of 1908, but the provision of Section 5 of the act providing that exemptions from liability shall be void, and that the acceptance of benefits under the relief contract shall not be a bar to recovery are not in contravention of any constitutional inhibition."

Counsel for defendant in error have cited in support of their contention that these sections are violative of the Fourteenth

Amendment of the Federal Constitution, the cases of *Mo. Pac. Ry. Co. v. Tucker*, 230 U. S., 340; *C., M. & St. P. Ry. Co. v. Polt*, 232 U. S., 165; *C., M. & St. P. Ry. Co. v. Kennedy*, 232 U. S., 626.

The first of these cases involved the right of the state of Kansas to fix railroad rates for transportation of oil, gasoline, etc., and fixed a penalty of \$500 for a violation of the act.

The second case involved the right of the Legislature of South Dakota to enact a law allowing double damages against a railroad company for failure to pay a claim or to offer a sum equal to what the jury finds the claimant entitled to.

The third case involved the same question as was raised in the second case.

Suffice it to say that even a cursory reading of these decisions will satisfy one that the rules therein laid down have no application to the cases under consideration. The statutes construed in these cases undertook arbitrarily, and without an opportunity to have the question tried in a court of law or equity, to confiscate property and property rights of railroad companies. These statutes were not regulatory, but highly penal.

The statutes of Ohio under consideration, Sections 9012, 9013 and 9014, General Code, are purely regulatory and not confiscatory, as were the statutes passed upon in the cases above referred to.

Upon a full and fair consideration of the cases, we are not prepared to say that these statutes are so palpably and manifestly in contravention of any of the provisions of the Federal Constitution or of the Constitution of this state as to require us to hold that the General Assembly had no power to enact the same. Courts inferior to the Supreme Court should be very chary in holding acts of the law-making body unconstitutional, and should do so only in cases which are clearly in contravention of the organic law.

For the reasons stated the judgment of the court of common pleas will be reversed and the causes remanded for such further proceedings as are authorized by law.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

1916.]

Stark County.

AS TO LIABILITY FOR THE DEATH OF AN ONLOOKER.

Court of Appeals for Stark County.

RENA PETERS, ADMINISTRATRIX OF THE ESTATE OF CHARLES D.
PETERS, DECEASED, v. WESTON C. HOWENSTEIN ET AL.*

Decided, January Term, 1916.

Negligence—Boiler of Traction Engine Bursts—And a Bystander Watching its Operation, is Killed—No Liability on the Part of Those Operating the Engine.

Recovery of damages can not be had for the death of one who was killed by the bursting of the boiler of a traction engine, which was being operated on a public road, where the decedent was not an employee of those owning and operating the engine, and was not present by invitation, but was a mere onlooker idly watching the operation of the engine.

*J. H. Robertson and Thomas F. Turner, for plaintiff in error.
Welty & Burt and Taylor & Stewart, contra.*

HOUCK, J.

This cause is here on error from the common pleas court of this county. The parties stand in the same relative positions as in the court below. The plaintiff brought suit in the common pleas court to recover of the defendants damages for the alleged wrongful death of the husband of plaintiff, Charles D. Peters, who was killed by the explosion of the boiler of a traction engine owned by the defendants, while the same was being used in hauling a steam shovel owned by one George Gareaux, on the 5th day of February, 1914.

Plaintiff avers in her petition that said boiler, engine, and the various fixtures and attachments thereto were old, having on said 5th day of February, 1914, been in use about fifteen years, and thereby had become greatly out of proper condition

*Motion to require Court of Appeals to certify its record overruled and motion to dismiss granted by the Supreme Court May 29, 1916.

and repair for proper safety in the use of the same, in this, to-wit: the safety valve on said boiler did not work properly, would clog and not permit the same to blow off from said boiler when the pressure became great; that the water-gauge cocks to said boiler were fast and would not turn; that said boiler was old, much corroded and worn, thin and leaky, thereby rendering the same weak, unfit, unsafe and insecure, all of which defective, unsafe and insecure conditions of said boiler and attachments, as well as the age and long continued use of said boiler and its attachments, were on said 5th day of February, 1914, and for a long period of time prior thereto, well known to said defendants, and to each of them, or that said defendants, in the exercise of reasonable care, could and should have known of the same, and that by reason of the premises the said defendants were guilty of negligence, which caused the injuries resulting in the death of plaintiff's decedent, and that the same was caused without any fault or negligence on the part of said decedent, and plaintiff prays for judgment against the defendants in the sum of ten thousand dollars.

The defendants filed an answer in the nature of a general denial.

The cause was tried in the common pleas court, and at the conclusion of all the evidence, and after both plaintiff and defendants had rested their case, the defendants moved the court to direct the jury to render a verdict in favor of the defendants. The motion was sustained by the court, and the jury returned a verdict for the defendants. To the sustaining of this motion by the court, and in the court's instructing the jury to return a verdict for the defendants, error is prosecuted to this court seeking a reversal of the judgment below.

The undisputed and conceded facts in this case, as disclosed by the bill of exceptions, are as follows: The defendants owned the traction engine and boiler in question, and were invited, through Mr. Howenstein, one of the defendants, to assist one George Gareaux in moving a steam shovel upon the public highway between North Industry and East Sparta, said Gareaux at that time having the contract for the grading, paving and im-

1916.]

Stark County.

proving of the highway, and defendants living in the vicinity where the work was being done, took the engine to the place where the steam shovel was located, the same being immediately in front of the Steinmetz farm, about three-quarters of a mile south of Howenstein Station, there being at that place in the road a highway leading to the east, and beginning on the east side of the road, known as the Steinmetz lane. Steinmetz's fields were inclosed by fences, and plaintiff's decedent was not engaged in any part of the work with Gareaux or the defendants, or either of them, and was not invited to the place in question, but out of mere idle curiosity had walked from Howenstein Station southward in the field of Steinmetz, and together with another person stood in the field back from the road some little distance from the engine and boiler in question watching the engine move the shovel, and while the engine was so engaged the boiler exploded, and plaintiff's decedent was struck by a broken part of the same, and as a result of said injuries departed this life the following day.

The defendants disclaim any liability, and maintain that they were not negligent in the operation of their engine or the boiler belonging to same, and that plaintiff's decedent was a trespasser, or a mere onlooker, and thereby assumed the risk he took by standing and remaining in the position where he was at the time of the accident, and that by reason of the premises the defendants, as claimed by them, owed no duty to the plaintiff's decedent save and except not to maliciously, intentionally or wantonly injure him.

We are free to say that the real question presented by the facts as disclosed in this case has never been passed upon by any court, so far as we know; and we have been unable to find any reported case, in this or any other state, covering the exact facts as shown by the record in the instant case.

What duty, if any, did the defendants owe to the plaintiff's decedent? The decedent was not in the employ of, nor had he been invited or requested to be present and occupy the place and position he did when the unfortunate accident occurred. He was simply an onlooker, an uninvited guest, and notwithstanding

the fact that the defendants might have been negligent in operating the engine and boiler in question, yet under these circumstances were the defendants liable in law to the plaintiff? In other words, what duty did the defendants owe to plaintiff's decedent, taking into consideration all the circumstances and facts of the case?

It will be conceded that the operation of a traction engine on the public highway is not unlawful, nor is it a nuisance in itself. If it becomes a nuisance, it is by reason of the fact of the way and manner it is operated, and not because it is a traction engine. The decedent not being an employee of the defendants, and not being present by invitation, and not about any business which would require him or his presence at the place where the injury occurred, but, upon the other hand, being there for the sole and only purpose, so far as the facts disclose, of satisfying an idle curiosity as to the operation of the engine and the steam shovel, can it be properly claimed that the defendants owed to him any legal or lawful obligation save and except that they would not wantonly, intentionally or maliciously injure him?

Under these facts and circumstances we think the only duty which the defendants owed to plaintiff's decedent was the duty of not wantonly or intentionally injuring him, and there is no evidence submitted that would in any way tend to prove that the defendants wantonly or in any way intended to injure the decedent.

Taking this view of the law applicable to the facts in the present case, we think the trial judge committed no error in sustaining the motion to direct the jury to return a verdict for the defendants. Finding no error in the record, the judgment below should be affirmed.

Judgment affirmed.

SHIELDS, J., and POWELL, J., concur.

1916.]

Hamilton County.

**PROBABLE CAUSE IN AN ACTION FOR MALICIOUS
PROSECUTION.**

Court of Appeals for Hamilton County.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY V.
GEORGE W. WINNES.

Decided, May 8, 1916.

1. In instructing a jury with reference to probable cause in such an action, it is the duty of the court to apply the law to the facts by telling them whether the facts which the evidence tends to establish, if found by them to exist, did or did not constitute probable cause for the prosecution.
2. It is error in such an action to refuse to give a special charge to the effect that, if the party causing the arrest in good faith laid the facts before an attorney and acted upon his advice in causing the arrest to be made, such advice is conclusive evidence of probable cause for the institution of the prosecution.
3. It is also error in such an action to refuse to give a special charge to the effect that the waiving of examination by the defendant before a justice of the peace is *prima facie* evidence of probable cause; or to refuse the special charge that the return of an indictment against the plaintiff by a grand jury is *prima facie* evidence of probable cause for the arrest.
4. And it is error to charge that if the defendant knew before the case was nollied that the charge was not well founded, his continuance in said prosecution may be regarded as evidence of actual malice for which punitive damages may be awarded, where there was no evidence that the defendant possessed such knowledge, and no explanation was given of punitive damages or of the kind of a case in which such damages may be awarded.

Waite & Schindel and *Herbert Shaffer*, for plaintiff in error.
Galvin & Bauer, contra.

JONES (E. H.), P. J.

George W. Winnes, by the consideration of the court of common pleas, recovered a judgment in the sum of \$3,500 against the Cincinnati, Hamilton & Dayton Railway Company for ma-

licious prosecution, which judgment the said company by this proceeding in error seeks to have reversed. It also prays judgment of this court in its favor.

It is claimed that errors occurred during the trial in the admission and rejection of evidence, in the general charge of the court, in the action of the trial judge upon certain of the special charges requested, and that the verdict and judgment are not supported by the evidence.

There was not much difference between counsel, during oral argument here, as to the evidence on the record touching the question of probable cause.

Upon the question as to whether or no such evidence showed probable cause for the arrest of Winnes counsel disagreed, and argued ably each for his own contention as to the effect of the evidence bearing upon this all-important point. So it is in their briefs. Both quote and rely upon the same evidence in support of their diverse conclusions of law. One argues from these facts that there was probable cause as a matter of law and that nothing was left for the company in the performance of the duty it owed to itself and society but to cause the arrest of Ludlum and Winnes. The other says that "there was no circumstance in this case that would lead an ordinarily prudent person to have a reasonable belief in the guilt of the person charged with the crime." In fact, upon this phase of the case there is so little dispute over the facts that the question becomes one of law, viz.: Did Woodward, the agent of the company, in causing the arrest of Winnes have a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a belief that Winnes was guilty of the offense with which he was charged? See *Ash v. Marlow*, 20 O., 119; *Miles v. Salisbury*, 21 C. C., 333.

The guilt or innocence of Winnes is in no wise involved in this controversy. It is only a question of the information in possession of Woodward or of the company at the time of the arrest, and whether he acted thereon as would any reasonable, prudent man.

1916.]

Hamilton County.

Notwithstanding the lack of essential difference upon material facts, we have carefully examined the record and have been confirmed in our impressions based on the argument that the verdict below was not supported by the evidence. There was such a correlation of circumstances, such a dove-tailing of incriminating evidence and such a logical development of suspicious acts and situations, all brought to the notice of Woodward in such a fashion as would in our opinion justify a reasonable man in taking the action complained of. The record we think shows caution and prudence on the part of the agents and employees of the railway company, and cool deliberate action free from malice. We can not say there was no evidence to support the verdict, but rather, in the language of the statute, that it is not supported by sufficient evidence. Probable cause is a mixed question of law and fact. For this reason we can not enter judgment here, but think there should be a new trial of this cause.

It therefore becomes important to notice other alleged errors occurring at the trial:

First, the failure of the court to charge whether the facts proved constituted probable cause. This may not be reversible error in this case, for the reason that it does not appear that the attention of the trial judge was called to the omission. The charge of the court was in the abstract. It gave the jury no assistance in determining what knowledge on the part of Woodward would constitute probable cause in this case.

Our view of the law is well stated by the court in *Hess v. Oregon Baking Co.*, 31 Ore., 503, at page 512, thus:

“Without further elaboration of this question or further special reference to authorities, it is sufficient to say that, under the adjudged cases, it is generally the duty of the trial court, in instructing juries in cases of this character, to apply the law to the facts by telling them whether the facts which the evidence tends to establish, if found by them to exist, will or not constitute probable cause for the prosecution, leaving to the jury only the question as to the existence of such facts, and that it is error to define probable cause in general terms, and to submit

to the jury the question as to whether the facts in the particular case do or do not come within such definition. The credibility of the evidence, and what facts it proves, are for the jury; but whether such facts do or do not constitute probable cause is a question exclusively for the court. The court should, therefore, by means of a hypothetical instruction, group the facts which the evidence tends to prove and instruct the jury that, if they find such facts to have been established, they must find that there was or was not probable cause."

The court was asked to give special charges, as follows, and of his refusal so to do plaintiff in error complains:

Special charge No. 8:

"The undisputed evidence in this case is that James H. Woodward, before instituting the prosecution against the plaintiff, laid the facts before a reputable attorney at law, a member of the Ohio bar, and asked his advice and was advised by said attorney that under such facts the plaintiff and E. C. Ludlum were in his opinion guilty of a crime, and that said attorney then prepared the affidavit upon which the prosecution was instituted. I therefore charge you that if you find from the evidence that said James H. Woodward in good faith laid all the facts which had come to his knowledge before said attorney and acted on his advice, such advice is conclusive evidence of probable cause for the institution of the prosecution."

Special charge No. 4:

"I charge you that the fact that the plaintiff waived examination before Justice of the Peace Vail is *prima facie* evidence that there was probable cause for the prosecution against him."

Special charge No. 9:

"I charge you that the indictment of the plaintiff by the grand jury of Warren county is *prima facie* evidence that there was probable cause for the institution of the prosecution against him."

Without citing authorities other than *Hess v. Oregon Baking Co.*, *supra*, we hold that the court erred in not giving these

1916.]

Hamilton County.

special charges. They correctly state the law and it was the duty of the trial judge to read them to the jury before argument, as requested.

The court erred in giving special charge No. 7 requested by plaintiff:

“The jury are instructed that if you find that at the time the defendant, through its agent, James H. Woodward, if you find he was such agent, while acting within the scope of his authority, commenced this prosecution, and did not have probable cause to believe, and did not believe, the plaintiff guilty of the crime charged against him, and such person afterwards knew before said case was nolloed that the charge was not well founded, his continuance in said prosecution may be considered as evidence of actual malice for which plaintiff is entitled to punitive damages in addition to the damage to which he might be entitled as compensation, if any.”

This was error:

First, because there was no explanation of the term “punitive damages,” nor of the kind of cases in which such damages might be awarded. *Miles v. Salisbury*, 21 C. C., 333.

Second, because there was no evidence showing that Woodward had any knowledge, before the case was nollied, of the innocence of the accused or that the charge was not well founded.

We find no errors except those pointed out.

Judgment reversed and cause remanded for a new trial.

JONES (Oliver B.), J., concurs; GORMAN, J., not sitting.

**THE RULE OF ORDINARY CARE IN CROSSING
RAILWAY TRACKS.**

Court of Appeals for Stark County.

THE PENNSYLVANIA COMPANY V. CHARLES J. GULLING.*

Decided, February Term, 1916.

Application of the Rule as to Looking and Listening—Must be Effectively Performed, Rather than Performed at Some Specified Distance from the Tracks—Charge of Court in a Crossing Accident—Whether the Approaching Engine Displayed a Headlight a Proper Question for the Jury.

1. The looking and listening required at a railway crossing is to be exercised at such proximity to the crossing as to make such looking and listening effective without regard to the distance from the tracks of the person so attempting to cross, and this requires that the looking be so done as to enable the person to see that the way is clear for him to get over the tracks in safety before a train within his range of view of the tracks, going at the usual rate of speed of fast trains, would reach the crossing.
2. Negligence is not shown in the case of one who looked when within forty feet of the crossing, and having a clear view of the tracks for the distance of three-quarters of a mile and neither seeing nor hearing an approaching train, drove upon the crossing in good faith believing he could safely cross, and in so doing was struck by a train.
3. Whether the engine drawing the train which struck plaintiff displayed a headlight, as to which there was affirmative testimony both for and against, and whether a failure to display a headlight was the proximate cause of the accident, was a proper question for determination by the jury.

*Carey & Armstrong and A. M. McCarty, for plaintiff in error.
Amerman & Mills and Lombard, Hext & Wasburn, contra.*

SHIELDS, J.

Proceedings in error are prosecuted herein to reverse a judgment of the Court of Common Pleas of Stark County, wherein

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 9, 1916.

1916.]

Stark County.

the defendant in error in a certain action for damages recovered a judgment against the plaintiff in error for alleged negligence in operating a train of its cars over a public highway crossing east of the village of Louisville, in said county, thereby causing permanent injuries to the defendant in error, as set forth in his petition filed in the court below. The principal grounds of alleged negligence set out in said petition are—

“that said company on November 12, 1914, about 5:30 P. M., and after dark, operated its said train of cars in a westerly direction over a certain public highway crossing, commonly called the Nickle Plate crossing, east of the village of Louisville, in said county, when the defendant in error, driving a team of horses attached to a wagon, attempted to drive upon and over the tracks of said company at said crossing, which cross said public highway at said crossing, and before attempting to drive upon and over said crossing listened for trains in either direction and hearing none, drove upon said crossing in the effort to cross the same, when said company's said train of cars approached said crossing at a speed of thirty-five or more miles per hour, without giving any warning by signal or otherwise, and without displaying any headlight on the engine attached to said train of cars, and did then and there negligently and carelessly, and with great force and violence run into and against said wagon in which the plaintiff was riding, demolishing said wagon and its contents, and with great force and violence threw the plaintiff out of said wagon and upon the ground, causing him severe, serious and permanent injuries,”

which are particularly described in said petition, all of which occurred, as claimed by him, without any fault or negligence upon his part, to his damage, including the moneys paid for medical treatment and the value of the wagon, in the sum of ten thousand dollars.

An answer was filed by said company admitting that its line of railway crosses said public highway at said crossing where the plaintiff collided with one of the defendant company's trains, whereby he sustained some injuries to his person and property, but not to the extent charged.

It admits that it was its duty to maintain a headlight on its engine and to give certain signals as it approached said crossing,

all of which duties it says were performed, and subject to said admissions the defendant denies all the other allegations of said petition.

For a second defense the defendant says that if it was negligent in any of the particulars complained of, which it specifically denies, the plaintiff by his own negligent conduct contributed to the proximate cause of his injury by failing to look and listen with ordinary care and prudence for the approach of said train, and by failing to stop and look and listen immediately before driving on said railroad track, and by failing to take reasonable and prudent precautions for his own safety. It denies it was guilty of carelessness, negligence or improper conduct, and says that plaintiff's injuries and damages were caused by the negligence of plaintiff himself.

For reply to the answer of the defendant, the plaintiff makes a general denial of the allegations therein.

After a verdict was rendered for the plaintiff, a motion for a new trial was overruled and judgment was entered on said verdict. Afterward and within the statutory period, a petition in error containing various grounds of error was filed in this court for a review of said judgment.

An examination of the bill of exceptions herein shows that this case is singularly free from objections made and exceptions taken to the admission and rejection of evidence upon the trial, and upon such examination we find the rulings of the trial court in said respects to have been proper.

It was argued that the trial court erred in refusing to give a charge to the jury before argument, on behalf of the plaintiff in error, what is designated in the bill of exceptions as Request No. 1, and which is as follows:

"It was the duty of the plaintiff, Mr. Gulling, just before driving upon the railroad track, to look for the approach of trains. If you find that the headlight on the locomotive in question was lighted and could have been seen by Mr. Gulling, had he looked just before driving upon the railroad track, then there can be no recovery in this case and your verdict must be in favor of the defendant."

1916.]

Stark County.

This request was refused, and, in our judgment, was properly refused. Reference was made by counsel in argument to the crossing cases of *C., C. & C. R. R. Co. v. Crawford, Admr.*, reported in 24 O. S., 631, and to *N. Y., C. & St. L. R. R. Co. v. Kistler*, reported in 66 O. S., 326, and the entry in the case of *Wooley v. C., H. & D. Ry. Co.*, 90 O. S., 387, was also referred to and commented upon. What the facts were in the last mentioned case we have no means of ascertaining, but testing said request by the rule of law laid down in the first two cases cited, and applying the reasoning of the rule therein stated, we do not think that said request falls within said rule, nor do we think that any fixed, inflexible and absolute rule requiring one to look at any given distance before attempting to cross over a railroad at a public highway crossing has been laid down by our Supreme Court. In the case of *C., C. & C. R. R. Co. v. Crawford, Admr., supra*, it is held that—

“1. Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.

“2. But the omission to use such precaution, by a person injured, will not defeat his action, if, by due diligence in their use, the consequence of the defendant's negligence would not have been avoided.

“3. Nor will the failure to use such precaution be regarded as negligence on the part of the plaintiff, if, under all the circumstances of the case, a person of ordinary care and prudence would be justified in omitting to use them.”

Again, in the case of *N. Y., C. & St. L. R. R. Co. v. Kistler, supra*, it is held that—

“The looking required before going upon a crossing, should usually be just before going upon the track, or so near thereto as to enable the person to get across before a train within the range of his view of the track, going at the usual rate of speed of fast trains, would reach such crossing.”

And, in the case of *Steubenville & Wheeling Traction Co.*, reported in 87 O. S., 187, the judge speaking for the court in that case in commenting upon the action of the court in the case of *C., C. & C. R. R. Co. v. Crawford, Admr., supra*, on page 194 says:

“The effect of the entire holding is that the omission to look is not negligence in all cases and *as matter of law*, and it remains the law of Ohio today, though there are a number of decisions of courts of other states, notably Massachusetts, which appear to hold a more rigid rule. It is the Ohio rule respecting the crossing of a steam road, and for a much stronger reason, the rule as to crossing a street railway track.”

Hence we think that no absolute rule has been laid down as to the looking required to be done at any given distance before going upon the crossing, but that the limit of the obligation on the part of one about to cross a railroad crossing is to exercise ordinary care *under the circumstances*, and that it should be so done “as to enable the person to get across before a train *within the range of his view of the track*, going at the usual rate of speed of fast trains, would reach such crossing.” In other words, the looking and listening required is to be at such proximity to the crossing as to make such looking and listening effective, without reference to any given distance therefrom. We call special attention to the holding in the Kistler case, because it serves to illustrate our view of the law on this feature of the case. Applying the principle just stated, let us inquire what the conduct of the plaintiff below was before attempting to pass over this crossing. It appears that the tracks east of said crossing for three-quarters of a mile were straight and that there was nothing east or west of said crossing for said distance to obstruct a view of said tracks. Turning to the record we find that the plaintiff below testified as follows:

“Q. Now about what time was it in the evening when you came to what we term the Nickle Plate crossing, north of Louisville? A. Well, let us see, we always go by sun time, I call it six o'clock, that would be 5:30.

“Q. Was it dark or not? A. It was dark.

1916.]

Stark County.

"Q. Now as you approached that crossing how was you driving, just tell the jury? A. As I approached the crossing I was driving along a slow trot.

"Q. Now tell the jury what kind of a crossing that is, that Nickle Plate crossing? A. Well that crossing—the first railroad you come to is the street car line.

"Q. That is the Stark Electric? A. Stark Electric: and my recollection is that there was a street car, not a regular street car, there wasn't any lights in it, going east; I was coming this way.

"Q. Which direction was you going from Louisville now? A. North.

"Q. Street car going east? A. I was going this way and the street car was going that way, and I was not sure that I could cross ahead of that car so I pulled in my horses to a stop.

"Q. About how close to the street car track? A. Of the street car track of possibly 20 feet, because I had a lot of confidence in this team, they wasn't afraid of anything of that kind.

"Q. Go ahead and tell what you next did? A. Then after this street car was past I started my horse on a walk, they walked across the street car track, and I leaned forward, I was sitting possibly like this (indicating) in my seat (indicating sitting forward on the seat, leaning forward); I leaned out of the front of the wagon and looked both ways to see if there was anything coming on the railroad track.

"Q. How many tracks is there there on that railroad crossing? A. Two tracks.

"Q. Double track? A. Double track.

"Q. How far is the closest track to the street car track; what is the distance approximately between those tracks? A. 65 to 70 feet.

"Q. Do they run parallel to each other at that crossing? A. Yes, sir.

"Q. How does the road that you was traveling strike the crossing, does it strike it perpendicular or at an angle? A. It strikes it at a sharp angle.

"Q. What you call an acute angle or what you call a diagonal? A. I would call it a diagonal.

"Q. Now, then, Mr. Gulling, just go forward and tell the jury what you did as you cross that crossing and what occurred? A. Well, after I crossed the street car track I leaned forward to look out for a railroad train; and I looked both ways twice at least, and when the team was on the railroad, the last time I

looked east, there is something seemed to come down on me—looked like a black mountain; I had a clear view, I looked around the front of that curtain, and the next thing they struck me; there was no use to reach for the whip; I had the whip in the socket, never used it, I had it for an emergency; I leaned forward and give the lines on my horses, give a command—I don't know what you call it—anyway they answered me and leaped forward and the train got the rear end of that wagon."

It thus appears that said request wholly eliminated the existing conditions, which were proper to be made known to and considered by the jury in determining whether or not the plaintiff was negligent before attempting to drive upon and over said crossing. If he looked when within forty feet of the track, as testified to by him, to see whether or not any train was approaching said crossing, and so looking he had a clear and unobstructed view of said company's tracks for a distance of three-quarters of a mile, and neither hearing nor seeing any train approaching said crossing, he then drove upon said crossing for the purpose of crossing over the same, and believing and having good reason to believe that he could safely cross, and when attempting to cross was struck by said company's train of cars, as the evidence here shows, such looking under such circumstances would not be negligence as a matter of law as would prevent a recovery.

It is contended on behalf of the plaintiff in error that the court below erred in its general charge to the jury upon the subject of displaying a headlight on the engine of said company. Section 8945-1 of the General Code provides that—

"Every railroad corporation operating a railroad or a part of one in this state, shall equip each of its locomotives with a headlight of such construction, and with sufficient candle power to render plainly visible at a distance of not less than three hundred and fifty feet in advance of such engine, whistling posts, land marks, and other warning signals," etc.

In its answer said company admits—

"That it was its duty to maintain a headlight on its engine, to give certain signals as it approached said crossing, and it avers that all of its duties in the premises were fully performed."

1916.]

Stark County.

As if adopting said admission said court instructed the jury as follows:

“The law requires, and counsel for defendant concedes, that the defendant must display, after dark, an adequate headlight on its locomotive, and that failure to do so is negligence. Now whether the defendant on the occasion in question failed in its duty in that respect, and if so whether such failure was the proximate cause of the plaintiff’s injuries, are questions of fact for you to determine.”

While perhaps it is true that every failure to perform a duty imposed by statute is not negligence as a matter of law, in this instance the statutory requirement appears to have been conceded, and the ultimate question of whether or not said company failed to display a headlight on its engine on the night in question, and if so, whether or not such failure was the proximate cause of the plaintiff’s injuries, was submitted to the jury to determine. We find no prejudicial error in said charge in this respect.

It is also urged that said court erred in its charge to the jury in respect to the statutory signals required, when negligence in this respect was not averred in the plaintiff’s petition. An examination of said petition shows that it was drawn with no little care and indeed with greater particularity of statement and detail than is required under the existing system of code pleading in this state. Quoting from said petition on this subject, it recites that—

“Yet the said defendant, well knowing its duties in the premises as aforesaid, did on, to-wit: the 12th day of November, 1914, negligently and carelessly run its said west bound freight train, then and there being drawn by an engine propelled by steam, at, to-wit: 5:30 o'clock in the afternoon, upon and over the track of said defendant and approached the said crossing at the intersection of the said tracks with the said highway, while it was dark, and negligently and carelessly failed to give due and timely warning of the approach of said train, engine and cars at a sufficient distance from the said highway crossing to give the said plaintiff, who was then and there approaching and attempting to cross the said track of the said defendant, in the exercise of

due care and caution for his own safety, and without fault or negligence on his own part, reasonable opportunity and time so that the said plaintiff could stop and avoid going upon and over the said tracks, and negligently and carelessly failed to ring the bell on the said engine, and negligently and carelessly failed to sound the whistle as a warning to the said plaintiff, and negligently and carelessly failed to give any warning or signal whatever of the approach of said engine and train as the said train approached and ran over the said crossing."

"In an action founded upon negligence, the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and that statement being made, it is sufficient to aver that such acts were carelessly or negligently done, or omitted." *R. R. Co. v. Kistler, supra.*

It is also argued that the verdict of the jury was clearly against the weight of the evidence and contrary to law. Counsel for plaintiff in error both in their brief submitted and in oral argument, contend that the decided weight of the evidence is that the headlight on the engine on the night in question was lighted at the time of said accident. That there is a marked conflict in the testimony of the witnesses testifying upon this feature of the case is apparent from a reading of the record, some of them giving positive testimony while that of others was negative in character. We recognize the rule that "all other things being equal, courts are naturally disposed to give more weight to affirmative than to negative testimony; to the witnesses who saw than to the witnesses who did not see," but when affirmative testimony is given as to the existence of a certain fact, both by the plaintiff and defendant, it then becomes a question of fact to be determined by the jury, under proper instructions by the trial court. In this instance there was such testimony before the jury tending to sustain the contention of both the plaintiff and the defendant in the respect mentioned, and it then became a question to be considered by the jury under instructions as indicated. *Gibbs v. Village of Girard*, 88 O. S., 34.

In the light of the record before us, we are of the opinion that the jury were fully justified in finding that the defendant in er-

1916.]

Hamilton County.

ror was not guilty of contributory negligence, or that such negligence on his part was the proximate cause of his injuries, and that the verdict of the jury was not against the manifest weight of the evidence or contrary to law.

Finding no error prejudicial to the plaintiff in error in the record, and further finding upon the whole case that substantial justice has been done between the parties hereto by the verdict returned by the jury and the judgment entered in the court below, the judgment of the court of common pleas will be affirmed.

POWELL, J., and HOUCK, J., concur.

**AS TO VALIDITY OF A CONTRACT OF SHIPMENT, ONE
PROVISION OF WHICH HAS BEEN WAIVED
BY THE CARRIER.**

Court of Appeals for Hamilton County.

JAMES F. BENNETT v. THE PENNSYLVANIA COMPANY AND THE
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY.*

Decided, February 14, 1916.

Carriers—Shipments Under the Uniform Live Stock Contract—Agreement by Carrier to Render Additional Service—Does Not Render Contract Void, Unless—Character of the Discrimination Which is Inhibited.

The waiver by a carrier of one of the provisions of a uniform contract of shipment, thereby giving to the shipper a service other and greater than that specified in the contract, does not render the contract void under the Ohio statute relating to unlawful preferences for transportation wholly within the state, unless the discrimination thereby given to the shipper is unjust or unreasonable and can fairly be considered as granting some privilege or concession not enjoyed by others similarly engaged.

*Reversing *Bennett v. Pennsylvania Co.*, 17 N.P.(N.S.), 42.

*Motion to require the Court of Appeals to certify its record overruled by the Supreme Court, May 22, 1916.

Black, Swing & Black, for plaintiff in error.
Maxwell & Ramsey, contra.

JONES (E. H.), P. J.

The discrimination inhibited by Sections 508, 564, 567 and 568 of the General Code is such an one as is unjust or unreasonable and can fairly be considered as giving some substantial privilege or concession not enjoyed by others similarly engaged.

Our statutes are practically like the provisions of the Interstate Commerce Act, and are to be alike construed. In *Union Pac. R. Co. v. Updike Grain Co.*, 178 Fed., 223, it was held, syllabus, 2d paragraph:

“Interstate Commerce Act Prohibits Undue and Unreasonable Prejudices and Disadvantages Only.—The interstate commerce does not prohibit the giving of all preferences and advantages or the production of all prejudices and disadvantages. It prohibits only those that are undue and unreasonable.”

Hutchinson on Carriers, Third Edition, Section 538:

“All special contracts or traffic arrangements between carrier and shipper are not forbidden or condemned, but only such as operate unfairly and evidence undue favoritism towards one, or deprive another of his just rights.”

The facts stated in the petition are not alone sufficient to warrant therefrom a conclusion that there was an unlawful discrimination in this case. The burden rests upon the railway company to prove that the favor shown the shipper constitutes an undue preference or unjust discrimination. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed., 37:

“Where a railroad company is charged with violating the interstate commerce act, by the issuance of ‘party-rate tickets’ at less than the rates charged single passengers, the burden of proving that such lower charge constitutes an undue preference is upon the person making the charge.”

The judgment is reversed and the cause remanded to the superior court for further proceedings.

JONES (Oliver B.), J., and GORMAN, J., concur.

1916.]

Hamilton County.

AS TO THE FILING OF AN INTERPLEADER.

Court of Appeals for Hamilton County.

TUCE ET AL V. MANCHESTER.

Decided, March 15, 1915.

When Interpleader Should be Filed—Discretion of Court in Granting Leave to File After the Issues Have Been Made—Judgment for Plaintiff on the Pleadings.

1. Section 11265, General Code, contemplates the filing of an affidavit of interpleader before the issues have been made by the filing of an answer, and while a court may have authority to permit the withdrawal of the answer in order to permit the filing of an affidavit of interpleader, such action would be entirely within its judicial discretion and error does not lie to a refusal so to do in the absence of a showing of abuse of discretion.
2. Judgment for plaintiff on the pleadings in an action to recover money advanced upon a real estate transaction will not be reversed where the petition avers that plaintiff authorized her agent to offer \$2,500 for certain property, advancing \$400 to apply on the purchase price; that the agent accepted a receipt for the money paid, stating that the property was sold to plaintiff for \$2,500 and payment of the June taxes; the plaintiff revoked her agent's authority and demanded return of the money advanced, no denial of the revocation being made and no averment being made in defendants' pleadings that plaintiff's agent had any authority to make or accept any other offer for sale than upon the basis of \$2,500.

Clement Bates, for plaintiffs in error.

Charles Sawyer and Peck, Shaffer & Peck, contra.

(Judges of the Sixth Appellate District sitting in place of those of the First Appellate District.)

CHITTENDEN, J.

The plaintiff below, Mary A. Manchester, brought an action against the defendants, Fred Tuke and others, to recover \$400 which she had theretofore paid to them in pursuance of a real estate transaction. The defendants filed an answer and later an

amended and supplemental answer. A motion for judgment on the pleadings was thereupon filed by the plaintiff, which motion was granted. The defendants then made a motion to permit the withdrawal of their amended and supplemental answer and for leave to file an affidavit of interpleader. This motion was overruled, and the defendants prosecute error to this court.

We find no error in the action of the common pleas court in refusing leave to file the affidavit of interpleader after the defendant had filed an answer and an amended and supplemental answer. The provisions of Section 11265, General Code, contemplate the filing of such affidavit before the issues are made by the filing of an answer. The court may have had the right to permit the withdrawal of the answers and the filing of the affidavit of interpleader, but this was a matter entirely within the judicial discretion of the court and we find that its action constituted no abuse of such discretion.

The more difficult question arises in determining whether the judgment entered upon the pleadings was properly entered. A majority of the court are of opinion that there was no error in granting the motion for judgment on the pleadings. The pleadings, as viewed by a majority of the court, show, in substance, that the plaintiff authorized her agent, Sadie Meyer, to offer \$2,500 for certain real estate, and placed in her hands \$400 to be paid as part of the purchase price of such property if the sale should be consummated. This offer was submitted to Tuke & Son, agents for the owner of the real estate, and their principal agreed to sell the property for \$2,500, with the further provision that Mrs. Manchester was to pay the June taxes. Thereupon Sadie Meyer paid the \$400 to Tuke & Son, and took their receipt for the same, which receipt set out that the property had been sold to Mrs. Manchester for \$2,500, she to pay the June taxes. Mrs. Manchester avers that the sale upon her proposition was never consummated, and we find no averment in the pleadings to the effect that Sadie Meyer had any authority to make or accept any other offer of sale than upon the basis of \$2,500. The petition further alleges, and this averment is not denied, that she revoked all further authority of the agent and

1916.]

Auglaize County.

made demand for the return of the \$400. While the pleadings are not as definite as could be wished, a majority of the court are of the opinion that they justify the judgment entered by the trial court.

Finding no error in the record sufficiently prejudicial to justify a reversal of the judgment, a majority of the court are of the opinion that the judgment should be and the same hereby is affirmed.

Judgment affirmed.

RICHARDS, J., concurs.

KINKADE, J., dissenting.

In my opinion the state of the pleadings was not such as to justify a judgment being entered in favor of the pleadings thereon.

INEFFECTIVE EXEMPTION CLAUSE UNDER A POLICY OF TORNADO INSURANCE.

Court of Appeals for Auglaize County.

AUGLAIZE BOX BOARD CO. v. CONNECTICUT FIRE INSURANCE CO.

Decided, July 22, 1914.

Insurance—Indemnity Against Loss from Tornado—Property Sold and Policy Assigned—Renewal of Policy Creates a New Contract, When—Assignee of Policy May Recover in His Own Right, When—Ineffectual Exemption Clause.

1. Upon the sale of property by an insured with an assignment by the seller to the purchaser of a policy of insurance covering such property which, as required by the terms of such policy, is assented to in writing by the insurer, and which by its terms limits the parties thereto to such policy as issued and such additional modifying terms as may have been endorsed thereon in writing, a new contract of insurance arises between the purchaser and such insurer upon the terms and conditions only of the policy as originally issued, with such additional or modifying terms as may have been endorsed thereon in writing prior to such assignment.
2. Thereafter the assignee of such policy, in case of loss, is entitled to recover in his own right and is not limited to a recovery in the

right of the insured named in the policy; hence, the assignee of such a policy is not affected by an exemption clause restricting the property covered by the policy which prior to such assignment was delivered by the insurer to the insured, but was not attached to or endorsed upon the policy, as required by its terms.

Gottschall & Turner and *Anthony Culliton*, for plaintiff.
Calhoun & Gunther and *F. C. Layton*, contra.

KINDER, J.

The plaintiff, the Auglaize Box Board Company, filed its petition in the Court of Common Pleas of Auglaize County, Ohio, against the defendant, the Connecticut Fire Insurance Company, and sought a recovery for the loss of three steel smokestacks upon a policy of insurance issued to the Western Strawboard Company of St. Marys, Ohio, which policy, by its terms, agreed "to indemnify the latter company against all such immediate loss or damage as may occur by wind-storms, tornadoes and cyclones to the property in the policy described in a sum not exceeding five thousand dollars, thirty-five hundred dollars thereof being on building, etc., and fifteen hundred dollars on their machinery of all kinds, including spare parts, gas and steam pipes, shafting, gearing, tubs, vats, bleachers, straw cutters, and their foundations, boilers, engines, pumps, their connections, setting and apparatus while contained in above-described building."

The policy contained the further provision:

"And it is hereby mutually understood and agreed, by and between this company and the assured, that this policy is made and accepted upon and with reference to the terms, conditions, stipulations and restrictions herein stated and referred to, all of which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing."

The petition contained appropriate averments touching the purchase of the property, so insured, from the Western Strawboard Company, and an assignment of said policy to the plaintiff with the consent and approval of the defendant company, to-

1916.]

Auglaize County.

gether with the fact that the smokestacks constituted a part of the property covered by the policy under the second item therein, namely, that portion insuring the machinery, etc., and the damage thereto by the casualty insured against.

The defendant filed an answer containing nominally four separate defenses. The fourth defense sets forth facts upon which was predicated a prayer for reformation of the contract, together with the assignment thereof, which are, in substance, that the exhibit attached to the petition does not state all of the terms and conditions of the agreement actually made between the defendant and the plaintiff's assignor; that one J. L. Smith was the agent of the defendant, together with a number of other companies issuing fire and tornado insurance; that on December 10, 1900, certain policies of insurance were issued by several companies, including the defendant, to the Western Strawboard Company; that in 1903 and 1906, on the expiration of policies, new policies of like terms were issued in lieu of such expired insurance; that while issued in such form the policies were in fact renewals of the original policy issued in 1900; that the said J. L. Smith was the agent of the Western Strawboard Company, having charge of its insurance, with power to effect insurance and to substitute other insurance upon cancellation or expiration of any policies issued to such company; that the original policy, while issued without an exemption clause, was, by the requirement of the company and with the consent of the Western Strawboard Company, modified by a rider attached so as to exempt from the operation of the policy smokestacks; that the policy issued in 1903 contained such a rider and that the policy issued in 1906, and upon which the suit is brought, was, by the mistake of Smith, the common agent of the insurance company and the Western Strawboard Company, issued to the last-named company without containing therein or having endorsed thereon the exemption clause as to such smokestacks, but that subsequently such exemption was prepared by said Smith and mailed to said company; that the mistake so made by said Smith in omitting said exemption clause was the mutual mistake of the defendant and said the Western Strawboard Company, and that defendant did not know of such omission of said exemption

clause and did not learn of the same until after the loss for which claim is made had occurred; that while the transfer of the policy from the Western Strawboard Company to the plaintiff was consented to by the defendant through its agent, Smith, neither the defendant nor said Smith, as the agent of said insured, knew that said policy did not contain therein or have endorsed thereon the clause exempting smokestacks from the operation of said policy.

The reply denied the affirmative averments of the so-called fourth defense, touching the assignment of the policy by the Western Strawboard Company to the plaintiff and the consent and approval thereof by the defendant company, together with a denial of all of the facts averred with respect to the issuance of the policy inconsistent with the averments of the petition and its right of recovery.

In the court of common pleas the fourth defense was treated as a cross-petition, and the issue tendered by said defense and the reply thereto was heard by and submitted to that court and resulted in a decree reforming the contract and the assignment as against the plaintiff in accordance with the prayer of said fourth defense or cross-petition.

Upon appeal the case is submitted to this court upon the issues thus tendered, the evidence and the arguments of counsel.

The following facts fairly appear, to-wit: In December, 1900, the Western Strawboard Company, then the owner of the buildings, machinery, etc., covered by the policy sued upon, applied for so-called cyclone insurance to one Smith, who was the agent of each of four companies, including the defendant company, and that four policies of \$5,000 each were issued to the Western Strawboard Company by said companies, concurrent in their terms and provisions and the time for which the same should be effective, except that three of the policies were dated the 11th day of December, 1900, and the policy of the defendant was dated the 10th day of December, 1900. Each of said companies refused to carry such insurance unless a provision was added exempting smokestacks from the operation of such policies. This provision was assented to by the Western Strawboard Company and a "rider" was attached to each policy embodying such ex-

1916.]

Auglaize County.

emption. At the expiration of three years, the term for which the policies were issued, new policies were issued, together with an additional policy of \$5,000. In four of said policies the exemption clause was inserted in the body of the policy, but in the policy of the defendant company it was attached as a rider in substantially the following language: "It is understood and agreed that smokestacks are not covered by this policy."

At the expiration of such policies in 1906, new policies, in lieu of the expired policies, were issued to the Western Strawboard Company, four of which, as in 1903, had embodied in the policy the exemption covering smokestacks. The policy issued by the defendant company as issued December 10, 1906, contained no such exemption provision, either in the body of the policy or by way of rider. The acting manager of the Western Strawboard Company, at the issuance of the first policy, instructed the agent, Smith, to keep in force the policies of insurance on the property of the company in so far as they were issued through his agency. The defendant company, on January 7, 1907, discovered that the policy as issued by it did not contain the provision exempting smokestacks, either as a part of the body of the policy or by way of rider, and instructed its agent to have said provision attached to the policy, and he, after receiving a second notice from the company, prepared a rider as follows:

"ST. MARYS, OHIO, December 10th, 1906.

"It is understood and agreed that smokestacks are not covered under this policy. Attach to policy No. 106.

. "J. L. SMITH, *Agent*."

He enclosed the same in an envelope addressed to the Western Strawboard Company with a request that the rider be attached to the policy in controversy herein, which envelope, containing such rider, was deposited in the mails. The rider was not attached to the policy by the Western Strawboard Company, and the plaintiff company, when it purchased the property and obtained the assignment of the policy with the consent thereto by the defendant company, had no notice or knowledge of the existence of such a rider or any clause or provision exempting smokestacks from the insurance provided for in said policy.

The agent, Smith, when he endorsed the consent of the company upon the policy, did not observe that the rider was not attached.

Whether such smokestacks are covered by the provisions of the policy hereinbefore quoted is not presented by the issues submitted to this court for determination. The single question is whether, under the facts above set forth, the defendant company is entitled to have the policy issued by it reformed, as against the plaintiff, by the addition thereto of the above provision exempting smokestacks. In other words, was the Auglaize Box Board Company, the assignee of the Western Strawboard Company, in privity with it and therefore subject to have the policy reformed in the manner prayed for herein, as would have been the case with the Western Strawboard Company, or did the assignment of the policy by the Western Strawboard Company to the Auglaize Box Board Company, with the consent of the defendant company, result in the creation of a new contract between the plaintiff and the defendant upon the terms of the policy as originally issued and without regard to the exemption clause of which the plaintiff company had no notice or knowledge?

If we have correctly understood the claims of the defendant company upon which it asserts the right to a reformation of the contract of insurance upon which suit is brought in this action, they are:

First. That the insurance agent representing the defendant company when the policy was issued was, by force of the instructions of the acting manager of the insured company at the date of the issuing of the first policy in 1900, constituted agent both of the insurer and insured, that he so remained at all times, including the issuance of the policy which is involved in this controversy, and that the omission of the exemption clause from the policy by such agent was the mistake or omission of both the insurer and insured and might be corrected by a court of equity.

Second. That the several policies having been issued to the same company covering the same property, and each for the same term, each policy issued upon the expiration of the preceding policy was but a renewal of the policy first issued, and

1916.]

Auglaize County.

hence all of the terms of the first policy, to which the insured consented, were incorporated in the policy last issued and formed a part thereof as though written therein or endorsed thereon in writing in accordance with the requirements of the policy last issued.

Third. That the assignee of the last policy, the one in suit, took the same upon the terms which bound the insured named therein (the assignor): (a.) Because of the policy being a renewal only of the original policy, and so incorporating all of its terms; or (b.) the limitation clause having been mailed to the insured company before loss accrued and said insured having made no objection thereto, it is presumed to have agreed that the exemption clause should form a part of the policy, even though not actually attached thereto, and that the plaintiff as assignor is bound by the terms of the policy as so modified.

Upon the part of the plaintiff it is contended that as assignee of the policy upon purchase of the property covered thereby, it is bound only by the terms of the policy as originally written, or such modifications thereof as were endorsed thereon in writing as required by the terms of the policy, and that it can not be bound by any terms or conditions not so incorporated in the policy and of which it had no knowledge.

A policy of insurance, complete in its terms, issued upon the expiration of a former policy issued by the same company and covering the same property, is not a renewal of the policy first issued so as to incorporate in the last-issued policy any of the terms of the former policy not included in said second policy when by the terms of the later policy the company and the insured are expressly limited to the terms and conditions printed in such policy and such additional terms and provisions as may be endorsed thereon in writing with the consent of the company and the insurer.

The direction by an acting manager of a manufacturing company to an insurance agent, placing the larger part of the insurance carried by such company, to keep such insurance alive and attend to cancellations by effecting other insurance in place of policies canceled, does not constitute said insurance agent the

common agent of the insuring company and such manufacturing company as to policies issued to said company through such agent four years after such acting manager had severed all connection with such manufacturing company, and hence a mistake of such agent in omitting a clause exempting certain property from the provisions of such policy will not, under such circumstances, constitute a mutual mistake of the insurer and insured against which relief in equity may be granted to such insurer by a reformation of the policy so as to include such omitted exemption clause.

Upon the purchase of property of the insured with an assignment of the policy of insurance covering such property by the seller to the purchaser, which is assented to in writing by the company issuing the policy, a new contract of insurance arises between the purchaser and the insurer upon the terms and conditions only of the policy as originally issued or such additional or modifying terms as may have been endorsed thereon in writing prior to such assignment, and thereafter such assignee of the policy, in case of loss, is entitled to recover in his own right and is not limited to a recovery in the right of the insured named in the policy as is the case when the transfer of property is not absolute and the assignment is for security. Hence, the assignee of such policy is not affected by an exemption clause restricting the property covered by the policy which was mailed by the agent of the insuring company to the insured under the policy, but which was not attached to or endorsed upon said policy as required by its terms when issued, and especially is this true when it is not shown that the purchaser or assignee had any knowledge of the existence of such restrictive clause.

Judgment for plaintiff.

Crow, J., and DONNELLY, J., concur.

DEVISEE FOR LIFE—NO VESTED ESTATE IN HER HEIRS.

Circuit Court of Cuyahoga County.

ARIBELLA T. BARLOW V. FRANCES A. OTSTOTT ET AL.

Decided, December 24, 1902.

Wills—Interpretation of Devise.

A devise to trustees, with directions to pay the rents and profits to A during her natural life and at her death to convey the property to her legal heirs in fee simple, does not vest any estate in the children of A during her lifetime and the "legal heirs" of A are determined at the date of her decease.

Weed & Miller, for plaintiff in error.

Chas. H. Taylor, contra.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Error to the court of common pleas.

The facts in this case are as follows:

In the year 1845 Margaret Norton died in the city of Cleveland, Cuyahoga county, Ohio, where up to the time of her death she was the owner of a valuable parcel of real estate fronting on Bank street in said city. Said Norton left a will, which was duly probated in the probate court of said county. She left surviving her a daughter, Harriet F. Dockstader. The said Harriet at the time of the execution of the will of said Norton and at the time of said Norton's death, was the mother of two children, who were her only descendants. One of the provisions of said will reads:

"I give and devise my real estate situated in the city of Cleveland, * * * unto Alonzo S. Gardner and David G. Doan, and the survivor of them and the heirs of the survivor of them to have and to hold the same to the uses following, to-wit: That they the said Alonzo S. and David C. and the survivor of them and the heirs of the survivor shall from the rents and profits of said real estate (if I do not leave money and debts sufficient for the purpose) pay my just debts, charges of administration and funeral expenses and erect a suitable and respectable monument or grave stone over the grave of my deceased mother and over my

own grave and after paying the charges above imposed on it they the said Alonzo S. and David G. and the survivor and the heirs of the survivor shall during the lifetime of Wm. B. Dockstader, the husband of my daughter Harriet F. Dockstader, take and receive the rents and profits of said real estate herein before described and therewith make all necessary repairs, pay all taxes and other necessary charges and expenses in and about the same and after deducting all such payments and reasonable charges for attending to the business, shall at least once in each year and oftener, if said Alonzo S. or David G. or either of them or the heirs of the survivor shall see fit, pay over the residue of such rents and profits to my daughter Harriet F. Dockstader during her natural life, to her sole and separate use and benefit and after her decease convey said real estate above described to her legal heirs in fee simple."

The trustees named in this item of the will duly qualified and acted in the execution of said trust for some time, when they were succeeded by Virginia E. Kidney, who, after acting for a time as such trustee, resigned and was succeeded by Bolivar Butts, who is still engaged in the execution of the trust.

The two children of said Harriet F. Dockstader hereinbefore mentioned were Frances A. Otstott and George B. Dockstader. Harriet F. Dockstader died on or about the 18th day of April, 1899. Prior to the death of said Harriet, her son, George B. Dockstader died, unmarried and without issue. On the 13th day of June, 1889, said George B. Dockstader executed a warranty deed to Lyman C. and Procter Thayer conveying to them for a valuable consideration his right, title and interest in and to the real estate herein before mentioned. At the time of the death of said Harriet said Frances A. Otstott was her only living descendant. The plaintiffs in error, by proper conveyances, are the owners of whatever rights the said Lyman C. and Procter Thayer took in the premises by virtue of the conveyance made to them by the said George B. Dockstader.

The action in the court below was brought by the said Frances A. Otstott, and the prayer of her petition is that the said Bolivar Butts, who is made a defendant, may be ordered to convey the premises to her, and that the title to such premises may be forever quieted as against the plaintiffs in error.

1916.]

Cuyahoga County.

The plaintiffs in error file an answer and cross-petition in which they set up substantially the facts as hereinbefore stated and pray that the said Butts be ordered to convey an undivided one-half of the premises to them.

To that answer and cross-petition the said Frances A. Otstott filed a general demurrer. That demurrer was sustained and the plaintiffs in error, not desiring to plead further, a decree was entered that the premises be deeded to the said Frances and that the plaintiffs in error had no right or title therein. The error complained of here is in the sustaining of such demurrer and the entering of such decree.

The question presented depends entirely upon the construction to be given to said will. If under such will the said Otstott and the said George B. Dockstader became, when said will was probated, vested with an estate in said premises, there was error in the overruling of said demurrer; otherwise, there was not.

On the part of the plaintiffs in error it is claimed that the will is to be construed as though it read as it now does with the exception that the last clause hereinbefore quoted reads: "And after her decease convey said real estate above described to her two children, Frances A. Otstott and George B. Dockstader." If this were the reading, there could be no doubt that each of these parties would have had a vested right in the premises from the time of the probate of the will, and so the deed made by the said George would have conveyed a title under which the plaintiffs in error would be entitled to make the claim which they do make; and this would probably be so even though the names of the two children had been omitted from the will. To hold that the will as it now reads has the same effect in law as though it read as above suggested would be to hold that the words "her legal heirs" have the same meaning as the word "children" would have if substituted therefor. Technically the word "heirs" has a different meaning. The definition given in Anderson's Law Dictionary of the word heir is: "He upon whom at common law the law casts the estate immediately upon the death of the ancestor;" and this is the recognized meaning of the word, though it is not infrequently used in wills, and perhaps other instruments, in a different sense, and not infrequently is con-

strued to mean "children," but it is ever held in a will to have this latter meaning, or any other than its strict technical meaning, unless the plain meaning of the will derived from the context requires a different meaning. In the present case we find nothing in the context to indicate that the testatrix intended any other than the strict technical meaning of the words "heirs at law." For some reason she was not willing that her daughter should be the owner of this property, but she wished her to have the entire income from it during her lifetime, and it seems the natural and probable construction of the will to say that she wished the property at the death of her daughter Harriet to go to the same persons to whom it would go if Harriet were the owner of the property in fee at the time of her death and should die intestate. This result will be accomplished by giving to the words "heirs at law" their technical meaning. At her death she left as her only heir at law the defendant in error Otstott. If Harriet had owned this property and died intestate the law would have cast the estate upon Otstott, because she was the heir at law.

Holding as we do, that the testator provided that the same person or persons should take the estate at Harriet's death as would have taken it had she owned it and died intestate, it follows that the plaintiffs in error have no interest in the estate, and the judgment of the court of common pleas is affirmed.

1916.]

Cuyahoga County.

SECURITY OBTAINED BY DURESS AVOIDED.

Circuit Court of Cuyahoga County.

THE STATE BUILDING & LOAN COMPANY v. NETTIE E.
BAKER ET AL.*

Decided, January 29, 1900.

Duress—When Criminal Prosecution Amounts to Duress—Arrest of Brother May be Duress—Duress a Defense as Against Bona Fide Purchaser of a Mortgage—Transferor of Negotiable Securities Procured by Duress Becomes Principal Debtor.

1. Where a criminal prosecution is for the purpose of collecting a debt, it is commenced for an illegal and unlawful purpose, and although there may be a good cause for prosecution, and although the form of proceeding and the writ be perfect and without fault, yet the law will regard such a prosecution as duress and any security obtained through it may be avoided.
2. The arrest of a brother may amount to duress where a sister executes notes and mortgages to secure the debt of the brother and save him from criminal prosecution.
3. Where notes and a mortgage are obtained by duress and transferred to a *bona fide* purchaser for value before maturity, duress being a species of fraud, may nevertheless be set up as a defense to the mortgage.
4. Where one gives a note or mortgage under duress, even though it be for the purpose of preventing a criminal prosecution, that fact does not prevent the giver of the note or mortgage from defending an action brought upon it upon the ground of duress.
5. Where one who has obtained a note and mortgage by means of duress, transfers them to an innocent purchaser for value and before maturity, he thereby becomes the principal debtor and the maker becomes the surety.

Herrick & Hopkins, for plaintiff.

Boynton, Horr & Uhl, N. N. Cole and *W. W. Boynton*, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

This case is before us on appeal from the common pleas court.

*Affirmed without opinion, *State Loan & Building Co. v. Baker et al*, 65 Ohio State, 564.

It seems that James B. Harrington was in the employ of Olmsted Brothers as a solicitor, and as a collector to some extent. Soon after he went in their employ they allowed him to retain monies or they loaned him monies or, perhaps, both, to the extent of several hundred dollars, and after he had been in their employ for some time, the Olmsted Brothers claimed to have found that he was appropriating to his own use other monies that ought to have been turned over to them. When they ascertained this fact, they attempted to get a settlement out of him for the entire amount that he owed them.

This settlement was pressed from time to time upon him, and each time he made promises that he would do something, but evidently his efforts in the direction of either payment or the giving of security for what he owed, including what he had lawfully received from them and what he had appropriated, all failed, and he was unable to make settlement and his promises became wearisome to the Olmsted Brothers. They called in their attorney and presented to him, not in a written form, but orally, the state of the claim between themselves and Mr. Harrington—as to that which had been loaned or was lawfully in his hands, as well as that which they claimed was unlawfully in his hands. The attorney went to his office and an arrest was made. Harrington was taken to the defendant, Nettie E. Baker, where she was teaching in this county, by the officer and she dismissed her school and went and signed the bail bond for Harrington.

This was on the 15th of March, and the case was continued until the 22d of March; on the 22d it was continued until the 24th, but on the 22d of March there seems to have been a settlement of this claim, and Nettie E. Baker pledged property that was in her name and of which she was the owner, at least for the present I will say that, and the prosecution was dropped. The attorney of the Olmsteds went to the justice and told him that they would not appear; and when the day arrived for the trial neither the attorney for the Olmsteds nor the Olmsteds themselves appeared, and the prosecution was dismissed.

In settling this matter, Nettie E. Baker signed a number of notes amounting to some \$1,617. She signed notes falling due

1916.]

Cuyahoga County.

at stated periods in the future, and gave a mortgage on property to secure the notes. The notes and mortgage were by the Olmsted's soon after turned over to the plaintiff, the State Building & Loan Company, and was then and still is held by that company.

The first note became due and was not paid. There was an option in the mortgage to treat them all as due, if there was a default in the payment of one, and availing itself of the option of treating them all as due, and seeking to foreclose the mortgage on this property, this action was brought.

Nettie E. Baker answered, setting up duress, although that term is not used; yet the facts are set forth, and it is proper to treat the answer as setting up duress and setting up the compromise of this criminal prosecution; and, upon those two defenses, she claims that the Olmsted's have no rights against her and have no right against her by reason of her giving the note and mortgage to them. As to the bank, she claims that it was not a *bona fide* holder of the mortgage, and she claims that the bank can make no defense against her rights as far as the mortgage is concerned, and asks to have the Olmsted's brought in and that it be determined that as between her and the Olmsted's, Olmsted Bros'. liability upon the notes be primary, and hers only secondary to theirs. The Olmsted's endorsed the note to the State Building & Loan Company.

We have heard the evidence in this case, and the *purpose* of the criminal prosecution is the first question in order to be considered.

It seems that when the Olmsted's ascertained the fact that Harrington had been taking from them and appropriating to his own use moneys that belonged to them, they did not attempt to get him to turn back to them or secure to them the amount that he had illegally appropriated, but made the attempt to collect their entire claim, and seem, as between them and him, according to the testimony, to have attempted to make his settlement before arrest the settlement of the entire claim or none of it. In Mr. Olmsted's testimony upon this matter he at no time mentions anything but the settlement of the *entire* claim. When the attorney went to the office of the Olmsted's, at the time he was first

called, the entire claim was presented to him and, while not put in his hands in the form of an account, yet he at that time, and at no other time, so far as the testimony shows, ascertained the exact amount that was loaned or was legally in Harrington's hands, and the amount that he had illegally appropriated.

The prosecution was commenced for criminally appropriating a part of this money. When Mr. Harrington was arrested he was taken by the officer who arrested him a considerable distance into the country, to the school-house where his sister was teaching, and she was given to understand that he was under arrest and that she was needed to bail him. She came into the city and gave bail.

One of the Olmsted Brothers testifies, substantially, that is, he admitted he so testified before and does not deny but it is true now, that the understanding between himself and brother and their attorney was, that this prosecution would be commenced and allowed to stand for a while—to hang in that condition.

The first attempt at any settlement is a little uncertain. Some of the witnesses place it immediately after the giving of bail, or very soon after; other witnesses place it after the continuance—after the first time the suit was set for trial, and it is not very clear just when the negotiations commenced to settle this claim; nor is it certain how long Mrs. Baker had to consider this matter, after it was first presented to her—I mean, the matter of her mortgaging her property.

The method in which Mr. Olmsted undertook to settle this claim—before criminal action was commenced against Mr. Harrington; the fact that the conclusion between the attorney and the Olmsteds was to commence the action and let it lie, let it rest, taken with what followed, shows that this action was commenced, not for the purpose of bringing into action the strong arm of the criminal law of the state for the proper purposes, but for the purpose of collecting that debt. The prosecution, therefore, was commenced for an illegal and unlawful purpose; and, as we understand the law, if it is commenced for an illegal and unlawful purpose, although there be good cause for prosecution and although the form of commencing the prosecution and the

1916.]

Cuyahoga County.

writ be perfect and without fault, yet the law will not uphold such a prosecution and it will be regarded as duress. Out of many cases we have seen, I submit the language used in the case of *Osborn v. Robbins et al*, 36 N. Y., 365. I read from the opinion on page 371:

“The note was executed when the principal defendant was a prisoner; and it could not be enforced by the payees if they obtained it through an abuse of legal process, for purposes of oppression and exaction. When a party is arrested without just cause, and from motives which the law does not sanction, any contract into which he may enter with the authors of the wrong, to procure his liberation from restraint, is imputed to illegal duress. It is corrupt in its origin, and the wrong-doer can take no benefit from its execution.

“In such a case, the element of voluntary assent is wanting. The parties do not meet on equal terms. The authority of the courts is perverted to unworthy uses. The instrumentalities employed to produce a consenting will are force and fraud, agencies which the law abhors. The prisoner is at the mercy of the accuser, and he submits to extortion, as the means of deliverance from oppression under the forms of law.

“The party who exacts a security from one whom he wrongfully restrains of his liberty, can derive no aid from the fact that the claim which he enforced by illegal means was just.”

The next question to be considered is whether Mrs. Baker stands in such relation to this matter that she can avail herself of the defense of duress.

It has been laid down that coercing a father or using duress upon a father to secure a note given by a child, and *vice versa* avoids the note, and one authority says that there is no doctrine limiting that rule; that the courts have only talked about a limitation, as between blood relatives because of the fact that some courts had laid down that the rule might extend to a son who had been coerced into giving security to relieve his father from imprisonment, or *vice versa*, and that no rule had ever been established by any court saying it should never be extended beyond that. So far as my observation goes, that is so. It has been extended in Illinois to a grandmother who was coerced into giving security to save her grandson; and, in Wisconsin, to a sister giving security to relieve her brother from imprisonment; and

it seems to be extended to all cases where there is intimate relation, blood relationship, between the parties, if the coercion is sufficient to overcome the will of the party giving the security.

We do not hesitate to hold upon all of these authorities, that Mrs. Baker can avail herself of this as completely as could her brother had he given notes and security instead of her; and that, if she gave this security to save her brother from imprisonment; if she did it to relieve him from an unlawful imprisonment she can avail herself of the defense she sets up in this action. But it is contended that she had time for deliberation in this matter, and that having had time for deliberation, must now be inferred that the circumstances under which she gave this security did not deprive her of her free-will; but, having done it after time for deliberation, that the matter is supposed to have been done voluntarily on her part.

The class of cases holding this doctrine, almost all of them are cases where the party makes some payment *after* delivery of the security or note, or does some act, *after* the matter is settled in court to carry out the contract that he had entered into, *after* the time when the restraint or the impending calamity that is about to befall the party, has passed away and gone. And there are one or two cases where the party had time for deliberation and counsel with attorneys and friends, and then went and did it. But I find no case like *this*; and, as I have already stated, the testimony is very uncertain as to the time Mrs. Baker had to deliberate about mortgaging her property. I speak of *mortgage*, as that is the principal matter. The note was rejected when she offered to give her note; that was not relied upon; it was the property that was relied upon in this matter—that was the real gist of the matter. It is not known from this testimony, whether it was one hour or two hours or three hours that she had as time to deliberate whether she would mortgage that property or not. It is not known whether the pressure was continued or increased up to the very moment when she gave the mortgage; but, evidently, she gave it under that pressure, and we believe she was deprived of her free-will, when she gave it, by the pressure brought to bear, the arrest of her brother and

1916.]

Cuyahoga County.

likely the imprisonment of him, and whatever was said in regard to the settlement of the matter in her presence.

Having found these facts in the case, and the law as I have stated, the question now remains, what can she do?

It is claimed that this mortgage is in the hands of an innocent holder. But we have a case in this state, *Baily v. Smith et al*, 14 O. S., 396, which holds that while notes may be in the hands of an innocent holder and fraud can not be set up against the innocent holder of the notes, that is not true as to the mortgage. This is different from the holdings in the United States courts and in most of the states, though not in all. This was a decision made by Judge Ranney and is good law in this state and has never yet been overruled. Whether the Supreme Court would extend it beyond a case of fraud we know not, and we need not consider it in this case for the reason that duress is a species of fraud; it is obtaining property or money against the will of the party, and fraud is exercised only to overcome the will of parties wrongfully, and duress is only to overcome the will of a party wrongfully or by fear; one is through confidence—the other through fear. They are so related that duress is a species of fraud.

This being true, and following the decision I refer to, we must hold in this case that the State Building & Loan Company can make no more defense to this action than could the Olmsteds and can maintain no action upon the mortgage as against Mrs. Baker that the Olmsteds could not maintain.

But it is strenuously contended in this case on one side, and, upon the other side, as strenuously the other way, that there was no illegal settlement of this matter; and the attorney who settled the matter with Harrington and his sister, Mrs. Baker, is brought in to testify, and we, all of us, believe him to be a person of the utmost veracity and would not hesitate to believe anything to which he would testify. We might believe that he was mistaken, but his testimony in this case is largely a matter of argument in his own mind. Many of the things that he testified to are matters that he testifies to from his mode and method of doing business and what he now thinks he would have done under the circumstances; and his recollection is poor; he is mixed up

in his dates; he is mixed up in the order in which the circumstances occur—it is a matter of want of recollection; at the time this matter was disposed of, he dismissed it from his mind, no doubt he went into many other things; and under all the circumstances of the case, it is not surprising that he should forget much of the detail of the matter and much of the conversation.

Mrs. Baker testifies to certain matters and conversations between her and the attorney. The attempt is made to show that such did not take place as testified by her, at any such time; but the attorney is evidently very much mixed up as to the time when he undertook to say it did occur; but it is almost evident, under the circumstances of this case, that it must have occurred at an earlier date than he said. He testifies that he told Harrington, at the commencement of negotiations, that, of course, he could not make any arrangement or agreement to dismiss the criminal prosecution against him or not to prosecute him. Evidently, to call forth that remark on his part, there must have been some consideration upon that matter, or we see no reason why he was called upon to state that. Of course a person in negotiating under the circumstances he did, may have had more or less fear that such a result might be inferred and might, as a precaution, make a statement of that kind. Harrington testifies to a conversation on the same matter with the Olmsteds, which is denied. But, when we take into consideration the method in which the Olmsteds undertook, in the first place, to collect their claim; when we take into the consideration the method of prosecution—to have it commence and then have it lie along; when we take into consideration that the day before the trial was to begin, their attorney went to the justice and said they would not appear to prosecute and they did not appear when the trial was to commence and it was dropped entirely; when all these facts and circumstances are brought to bear upon this matter—and the poor recollection of the attorney, and the hesitating manner in regard to this matter, in which the Olmsteds testify; we believe that Mrs. Baker was given to understand, and the Olmsteds and their attorney meant that she should understand, perhaps, not by express words, but by actions, and by their conduct taken

1916.]

Cuyahoga County.

in connection with what was said, that if she mortgaged her property and secured this claim, the prosecution would be dropped.

• But it is contended that there was nothing said or done in this matter that would influence her. I have already noticed the fact that it is claimed she had time for deliberation.

Mrs. Baker, who was once married, has a child fifteen years old, and after she became a widow, she went to teaching school in this county, and had bought a lot and, with the aid and assistance of her father, had undertaken to put a building on it, and was struggling to make a home for her people and pay off the debt she had incurred in getting this home. It was to her a most important thing that she should be able to continue her occupation as a teacher; she had the care and support of her aged parents; and the continuing of her occupation that she might pay her debts, and make a livelihood for herself, and child and parents was at stake, and it was important to have no blot upon herself and her family. She was situated in such a way that her will would be easily overcome. Taking all these things into consideration, we believe that this lady acted without any free will, but under the pressure placed upon her by these threats and the fear of imprisonment for her brother.

Now it is contended that if the criminal prosecution was not conducted, these parties, both of them, are guilty of a criminal act in suppressing a criminal prosecution.

• But this rule applies only where the parties act under a free will. There is no *parum delictum* where this is not true. We have already found that she did not act under a free will. Not acting under a free will, but under compulsion, how can there be a guilty act on her part? And if she is not guilty of committing a crime, none can be imputed to her in this matter, and, therefore, not being guilty of a crime, she may avail herself of the defense of duress.

I may say I have found a large number of cases cited in the brief where this doctrine is stated: That a party who acts under compulsion and makes a contract where the case results in being dropped, the party does *not* stand in *parum delictum* with the other parties.

She may, then, in this action, have whatever affirmative relief she is entitled to, and as against the plaintiff, the State Building & Loan Company, and, as against the Olmsteds, she is entitled to have this mortgage canceled, it being not void, but only voidable.

Furthermore, we think she is entitled, and we so hold in this case and the decree may be so drawn, that the Olmsteds, by means of fraud and duress practiced upon her, are the principals in this debt and she is the surety.

There is one other matter that the court ought to speak of. As we may be called upon to make findings of fact, we ought to state the father's interest in the property. The testimony is all one way upon this matter, and that is, that the daughter bought this lot and paid for it. The title was taken in her name, with an agreement with her parents, that she would help to raise the money to pay for it and build a house and her father would help by contributing his work, he being a carpenter, and he would do all he could; a house should be erected on the lot, and it should be the home or place of residence for the father and mother while they lived, and, after their death, the property and the possession thereof should be in Mrs. Baker.

It is claimed that that can not give to the father a life estate, because of certain relations between them as to their both living there and both having a home there; and that she can turn him out. We do not believe that she can turn her father out of that home, under that contract. We think that he has for a valuable consideration obtained an interest in that property, and that this interest is an interest that equity will recognize as an interest in the property, or that it is a life estate. There being no deed to him for life, it is a strong equity at least, one that he could enforce, not only against her, but against any one that acquired an interest in the property with notice of his rights.

Now, as to notice of his rights. He lived there; Mrs. Baker lived there; she went away to school early in the morning, but she was there every Sunday, and the father and mother lived there. And yet it is claimed that the way in which they lived, would be notice to no one.

1916.]

Cuyahoga County.

Now, the mere fact of his living there is notice that he is living on the property in some way, under some claim, or with his daughter, however it may be. But there is enough, in our judgment, to put any one who knows that much, upon inquiry as to his rights; and whatever that inquiry may develop, the parties must be charged as knowing. This is an old rule in equity: and the bank, therefore, and the Olmsteds must be charged with knowing his rights there as fully as Mrs. Baker knew them. That being true, we think he has a right in that property that can be protected as against the mortgage.

**NO DISCRETION IN AN APPOINTING OFFICER UNDER THE
CIVIL SERVICE.**

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL CHARLES F. COOLIDGE, v. H. H. HYMAN,
AS DIRECTOR OF THE FIRE DEPARTMENT OF
THE CITY OF CLEVELAND.

Decided, March 23, 1900.

*Municipal Employees—Civil Service Examinations—Appointing Officer
Bound by Civil Service Laws and Regulations—Courts Will Not In-
terfere With Civil Service Examination, When.*

1. When an officer is required by law to appoint and promote city employees from a list of those who have attained a certain grade in competitive civil service examinations, he can not, in the exercise of his discretion, promote one who has failed to attain the prescribed grade, even though it be by the fraction of one per cent. and there are special reasons why he believed that one will be more efficient in the position to which he desires to promote him.
2. While rules governing the conduct of civil service examinations, as established by the city council and the examiners, should enumerate the subjects upon which applicants are to be examined, yet a failure so to do will not be ground for interference on the part of the courts where it appears that the examinations, as conducted, were upon the subjects upon which it would be necessary for the appointees to have knowledge.

A. Burt Thompson, for plaintiff.

T. H. Hogsett and Beacom, Excell & Gage, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

The statute provides that the mayor and the director of the fire department in the city of Cleveland shall draw up certain regulations governing the introduction of men into the fire department and their promotion from time to time in order to conduct examinations both for entering and for promotion; and it provides that an assistant engineer or fireman can not be promoted to that of an engineer when promotions are to be made, unless he has stood 80% in his examination for promotion.

The relator here, Coolidge, was promoted when he stood a fraction of one per cent. less than that.

There was another man on the list at the time who stood 83%, but was not promoted.

The director of the fire department at the time of this promotion was made, claims that there is a discretion, after all, on his part, and that he could take this man and promote him, although there was another whose per cent. upon examination was higher, and the grounds for so claiming, is that in making promotions, notwithstanding examination, the director must look to the age, the judgment, the manhood, and all such things, to guide him in all his promotions.

But, most clearly, if he would have a right to take a man who stood less than 80% and promote him when there were others on the list standing more than 80%, he might carry that to a great extreme upon his ideas of judgment of men. He might take one who stood only 60% and yet, in his judgment, was the best man for the promotion.

These regulations are adopted under provisions of state law under an ordinance, and that ordinance, we think, must be followed. It is turning this department, among others of the city, into a civil service department, and the provision of the ordinance and the law seems to be such that no one can get into the department except by starting at the foot of the ladder and

climbing towards the top, and promotions are to be made strictly upon merit and not upon favoritism.

Mr. Coolidge, after there was a change of directorship, was put back as fireman or assistant engineer and brings this action to require the director to restore him to the position of engineer.

There is another complaint made—that the rules and regulations which are adopted by the director and the mayor, and approved by the council, do not prescribe any sufficient rules and regulations governing the examination; that while they provide somewhat in detail and quite specifically as to the cadets, those who are coming into the department, yet there is no sufficient regulation as to the method of examination as to how and upon what branches it shall be conducted when a promotion is sought.

The rules are quite specific as to what the candidate is to do to get his name before the examining board, and they are quite specific as to the board holding the examination, and all steps except, it is claimed, that there is a very serious defect in that the rules prescribe no branches nor line of examination, and that the board would be at liberty, so far as any rule adopted by the city would stand in the way, to examine him on Greek or any other language, or any branch of mathematics, or on anything that they might take a notion to examine upon. Of course, if the city examiners should hold an examination of that character, it would be very much contrary to people's notions of what an engineer needs; above all things, he needs a practical education.

The questions and answers that have been used in order to make these examinations uniform and fair, were presented to the court and have been examined, and they pertain entirely to the practical knowledge that a man has of the position that he is seeking to obtain. There is nothing else in them; and they are well adapted to call forth all that an applicant knows on that subject. There is, however, some ground for the technical objection, and it may be that this board should proceed hereafter to indicate on just what subjects applicants will be examined; for instance, engines, pumps and the practical care of them, and remedy for any defects that may arise at any time; the use of

heaters, signals, and all those things that pertain directly to the line of business; and to prescribe in the rules that the examination shall be confined to them. They have been confined there always, as the evidence shows, but the rule, perhaps, should be made definite upon that point.

But we do not feel that in this case, we ought to say for this reason that this party should be restored to the place which he had before. He had subjected himself to these rules and regulations, has undertaken to take his place in line of promotion by the rules that exist; and for us to undertake now to say that the board, the director, the mayor, and the city council have not made rules definite enough, might, perhaps, do in this department considerable injury and cause a great deal of trouble. We affirm the judgment of the board, and dismiss the petition.

1916.]

Cuyahoga County.

COSTS OF GUARDIANSHIP ALL SADDLED ON ONE WARD.

Circuit Court of Cuyahoga County.

CATHERINE WICKENDRAEGER v. JOHN C. HEMMETER.

Decided, December 3, 1900.

Guardian and Ward—When Action may be Brought for Error in Final Account.

Where a guardian is appointed to administer a fund in which two minor wards have an equal interest, and in the final account of such guardian it appears that one of the wards has been paid her half of the fund in full while all the costs of the guardianship were deducted from the share of the other ward, such manifest error and mistake as to the second ward is shown as to give him the right to bring an action under favor of Section 6289, Revised Statutes.

*Wm. H. Beavis and H. H. Johnson, for plaintiff.**Pinney & Klingman, contra.*

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

This is an appeal from the judgment of the court of common pleas. The facts are that the defendant was guardian of the estate, by the appointment of the Probate Court of Cuyahoga County, of the plaintiff and her older sister, Charlotte Wickendraeger. This guardianship began on the 13th day of April, 1882, and continued until the plaintiff arrived at full age on the 18th day of July, 1896. In 1897 the plaintiff filed in the probate court his final account of such guardianship, the account for the two wards being filed as one account. This account showed the balance in his hands for this plaintiff was \$345.55, and that the other ward had received payment in full of the amount to which she was entitled. No exceptions were filed to the account, and the same was approved by the probate court. No appeal was taken, but on the 30th day of June, 1898, such date being within two years of the time when the plaintiff arrived at full age, she brought this suit under favor of Section 6289 of the Revised Statutes of Ohio. This section provides that:

“The settlement made in the probate court of the accounts of a guardian shall be final between him and his ward unless an appeal be taken therefrom to the court of common pleas in the manner provided by law, saving, however, to subsequent guardians during the minority of his ward, or to any such ward, at any time within two years after such ward shall arrive at full age, the right of opening and reviewing such settlements for fraud or manifest mistake, by civil action in the court of common pleas of the county in which such settlement was made, or the county where such former guardian may reside when the petition is filed, at the option of the plaintiff in such action.”

The petition avers that “there is *manifest error and mistake* in said guardian’s final account in that he has retained \$250 from the amount due the plaintiff, for his services in his said trust,” and “that there is *manifest error and mistake* in the plaintiff’s deducting his fees entirely from the moneys remaining in his hands after the satisfaction of said Charlotte Wickendraeger’s half of said legacy when she became of full age.” Other matters in the final account, as well as in partial accounts previously filed by the guardian, are averred in the petition as being *manifest errors and mistakes*.

When the guardianship commenced there was placed in the hands of the guardian, the sum of one thousand dollars belonging to the two wards in equal shares, the same being a legacy bequeathed to them.

Upon hearing it is urged that under the statute above named, if it be found by the court that there are manifest mistakes in any account filed by the guardian, the entire account may be inquired into and all mistakes corrected, whether the same be manifest or not. In short, that the court should, on such hearing, pass upon the accounts of the guardian as fully and completely as though the same had come into court by appeal from the judgment of the probate court.

It is further urged that there are in the accounts of this guardian, mistakes which are “manifest” and other errors in the accounts. It is said that the amount allowed to the guardian as compensation for his services was in excess of the amount which should have been allowed, and that payment for such services

1916.]

Cuyahoga County.

was made to him by the mother of these two wards which was to be accepted as full compensation for such services.

It would seem that the intention of the Legislature in the enactment of the statute, was to provide only for the correction of accounts where no fraud is charged, to the extent that errors or mistakes are "manifest;" that is, they must be such as an examination of the account itself discloses, and unless the accounts filed by this defendant as such guardian, disclose some error or mistake, the petition in this action must be dismissed.

We are of the opinion, however, that there is *manifest error* in the accounts in this: that the guardian kept the accounts of these two wards as a joint account, charging himself for the two jointly with the one thousand dollars which first came into his hands for the two, then with the interest which was received on this money jointly for the two and crediting himself as against the two jointly for all payments made on account of such guardianship and for his services in the performance of his duties as guardian. There can be no doubt that the proper way to have kept his accounts would have been to have charged himself on account of each ward with the sum of five hundred dollars, and then to have taken to himself credit as against each for the payments made and services rendered on behalf of each.

The final account as rendered by the guardian made claim for the credit of \$340 for his services as such guardian; of this amount he had been previously allowed the sum of \$80.80, so that there was taken out of the funds in his hands as shown by his final account, at that time the sum of \$259.20. On the 5th day of December, 1894, the guardian had paid to Charlotte Wickendraeger the sum of \$500, she having, at that time, arrived at full age; and this was paid to her as a complete settlement of all to which she was entitled. For this payment the guardian in his final account takes credit, the practical result of which is that the \$259.20 allowed in the final account as compensation for the guardian is all taken from the money which would otherwise have been payable to this plaintiff. This error is manifest on the face of the account, and a correction of this manifest error should be made and is made here.

The true account of this ward is found by charging to the guardian upon his first account the sum of \$500 of principal and one-half of the two payments of interest made to him upon the filing of his first account, making the full amount to be charged to him on account of this ward at the time when his first account was filed, \$550, and crediting him at the date of such amount with \$50 paid for the support of the ward.

For the second account the principal is again \$500, and one-half of the interest which he charges himself with having received for the two wards is \$60, giving him in this account credit for one-half of the payments made by him for the two, the amount of \$64.25; this leaves a true balance in his hands of \$495.75. Pursuing this course with each of the accounts, it will be found that upon the filing of his final account there would have been due to Catherine, but for the payment of \$250 which he had previously paid to her and \$17.54, another payment which he had made to her, and \$10.99 which he had deposited with the probate court on her account and the allowance of \$129.60, being one-half of the \$259.20 allowed for services in said final account, the sum of \$509.91, deducting from this sum these several payments, to-wit, \$250 plus \$17.54, plus \$10 and said sum of \$120.60, there remains due to the plaintiff from the defendant, the sum of \$101.76, with interest from the 29th day of September, 1897, when such final account was filed, and for such last-named sum, judgment will be entered for the plaintiff, together with the costs.

1916.]

Cuyahoga County.

**AS TO THE PURCHASE OF BONDS OF A MUNICIPALITY BY
ITS SINKING FUND TRUSTEES.**

Court of Appeals for Cuyahoga County.

CITY OF CLEVELAND, BY JOHN N. STOCKWELL, DIRECTOR OF LAW,
v. BAKER ET AL.

Decided, December 17, 1914.

*Municipal Corporations—Bonds Purchased by Sinking Fund Trustees
Are Not Retired—But, Like Other Securities, Become Assets in
the Hands of Said Trustees—Bonds May be Sold by Them Below
Par, When—Where an Act is Legal its Motive is Immaterial, When
—Motion by Defendant for Judgment—Sections 3922 and 4514,
et seq.*

1. A motion for judgment on the pleadings being made by the defendants, the defendants can not be helped by the denials in the answer or by affirmative allegations in the answer that are denied by the reply.
2. Sections 3922 and 4514, General Code, evince an intention upon the part of the Legislature to encourage the investment of funds in the hands of the sinking fund trustees, or commission in the bonds of that municipality, and the purchase of such bonds by the sinking fund trustees, or commission, does not in legal effect amount to a retirement of such bonds, but such bonds become assets in the hands of such trustees, or commission, the same as other securities purchased by them.
3. Section 4517, General Code, confers full power upon the sinking fund trustees, or commission, to protect the credit of the municipality by giving them unlimited power to use the money and securities in their possession for the purpose, and such power is not limited by either Sections 3923, 3924 or 4522, General Code.
4. Where an act proposed to be done is legal, the motive that prompts the act is not material.

Heard on appeal.

John N. Stockwell, Director of Law, and *Albert H. Weed*, for plaintiff.

J. C. Hostetler, Assistant City Solicitor, and *Henry, Fauver, McGraw & Thomsen*, contra.

CHITTENDEN, J.

This cause was submitted on a motion made by the defendants for judgment in their favor upon the pleadings. The substance of the pleadings, so far as need be stated for the purposes of this opinion, is as follows: Newton D. Baker, Thomas Coughlin and William F. Thompson, as mayor, director of finance and president of the council, respectively, of the city of Cleveland, constitute the sinking fund commission of said city, and on the 22d day of October, 1914, said commission duly adopted the following resolution:

“Resolved, That for the purpose of accumulating funds to meet the obligations of the sinking fund, there be offered for sale bonds owned by the sinking fund commission, in the amount and of the description as follows:

“Five hundred thousand (\$500,000) dollars 4% city of Cleveland electric light coupon bonds, issued September 4th, 1912, maturing April 1st, 1947, and drawing interest from October 1st, 1914, and numbered from 50236 to 50735, both numbers inclusive.

“And be it further Resolved, That the assistant secretary be and he is hereby authorized and directed to write various bond brokers and banks situated in the state of Ohio, as follows:

“Sealed bids will be received at the office of the sinking fund commission, room 507, city hall, Cleveland, Ohio, until 12 o'clock noon, eastern standard time, on Tuesday, October 27th, 1914, for the purchase of:

“Five hundred thousand (\$500,000) dollars four (4) per cent. city of Cleveland electric light coupon bonds, issued September 4th, 1912, maturing April 1st, 1947, and drawing interest from October 1st, 1914.

“These bonds are owned by the sinking fund commission, Cleveland, Ohio, the principal and interest being payable at the American Exchange National Bank in New York City, interest payable semi-annually on April 1st and October 1st of each year.

“These bonds were purchased and paid for by the sinking fund commission on September 4th, 1912, and therefore are tax free in the state of Ohio.

“For the purpose of accumulating funds to meet the obligations of the sinking fund commission, Cleveland, Ohio, these bonds are being offered to the public. The validity of these bonds has been approved by the Supreme Court of the state of Ohio.

1916.]

Cuyahoga County.

"A certified or cashier's check drawn on some solvent bank, other than the one bidding, in the amount of 2% of the total amount bid for, and made payable to the order of the sinking fund commission, Cleveland, Ohio, must accompany each bid.

"The sinking fund commission reserves the right to accept any or reject all bids.

"Roll Call: Yeas, Baker, Coughlin, Thompson. Nays, None."

Pursuant to the terms of this resolution bids were solicited from various bond brokers and banks situated in the state of Ohio, by a circular letter, and on October 27, 1914, the bids of the prospective purchasers were opened, and it was found by the sinking fund commission that the joint bid of the defendants, Hayden, Miller & Company, C. E. Denison & Company and Otis & Company, was the highest and best bid for the bonds, and thereupon on the same day the sinking fund commission made an order as follows:

"That the five hundred thousand dollar (\$500,000) four (4) per cent. electric light coupon bonds be sold and the same be awarded to Hayden, Miller & Company, C. E. Denison & Company and Otis & Company, at their bid of four hundred and eighty-nine thousand and fifty dollars (\$489,050), plus accrued interest to the date of delivery."

The plaintiffs allege that the bonds so ordered sold were originally acquired by the board of sinking fund trustees of the city of Cleveland, which was the predecessor of the sinking fund commission, on October 12, 1912, and that since that date said bonds have been held by the sinking fund trustees and the sinking fund commission as an investment of its funds as provided by law. It is averred that the proposed sale is illegal and void for the following reasons:

First. That the sinking fund commission has no authority or power to sell any bonds of the city of Cleveland purchased by such commission for the reason that the purchase of the bonds of the city of Cleveland by the sinking fund commission is in legal effect a retirement of such bonds.

Second. That thirty days' notice of the proposed sale by publication, as required by law, was not made.

Third. That the sinking fund commission exceeded its authority in attempting to authorize a sale of such bonds at a price less than their par value, to-wit, 97.81 per cent. of the par value.

Fourth. That the recitation in the resolution setting forth that the bonds were to be sold for the purpose of accumulating funds to meet the obligation of the sinking fund does not state the real purpose of the commission in offering the bonds for sale. It is alleged that the bonds are to be sold for the purpose of enabling the sinking fund commission to raise money to be used with other money in its possession for the purpose of, first, meeting such maturing obligations of the city of Cleveland as the sinking fund commission shall in the future determine to meet, and, second, to pay for such bonds of the city of Cleveland as the sinking fund commission shall in the future decide to purchase.

It is alleged that if the proposed sale is made it will result in a loss to the sinking fund of the city of \$10,950, and that the sale of the bonds at 97.81 cents on the dollar is in violation of the provisions of law with reference to the care and maintenance of the funds in the control of the commission, and further that such sale will tend to injure the good faith and credit of the city. Plaintiff asks that an injunction be granted restraining the defendants from consummating the sale and transfer of the bonds, and for a decree declaring the agreement to sell and transfer such bonds to be void and of no effect.

The defendants in their answers admit the allegations of the petition, in so far as they refer to the acquiring by the sinking fund commission of the bonds in question and the several steps taken by the sinking fund commission to effect a sale of the bonds, and admit the proposal to sell the bonds as set forth in the petition. They deny the other allegations set forth in the petition. It is further alleged in the answers that the bonds in question are to be sold to meet the obligations of the city of Cleveland, as set forth in the resolution of October 22, 1914; that the bonds were acquired by the sinking fund commission or its predecessor in office, on or about September 12, 1912, as

1916.]

Cuyahoga County.

an investment of the funds of the sinking fund commission, and that such bonds are non-taxable securities; that at the time they were purchased, to-wit, on September 12, 1912, four per cent. was a fair market rate for investments of this character, but that since the 1st day of August, 1914, the market value of said bonds, as well as of all securities, municipal, state and national, has materially declined. They allege that the bonds constitute one of the assets of the sinking fund commission in which its funds are invested, and that said commission proposes to sell the bonds at the highest price obtainable therefor. They aver that said bonds, under existing financial conditions, are worth as assets of the commission such amount, and such amount only, as they are proposed to be sold for under the order of sale of October 27, 1914. They allege that no loss whatever will be caused the city by reason of the sale of the bonds at the price proposed, but that any loss is due to the fact that the market value of the bonds has depreciated by reason of financial disturbances incident to the war in Europe, which has generally decreased the market value of all securities. The defendants specifically deny that the bonds described are to be sold for any purpose other than that set forth in the resolution of October 22, 1914.

The plaintiff by reply denies that the market value of the bonds has materially declined; denies that the price at which the sinking fund commission proposes to sell said bonds is the highest price obtainable therefor; denies that the sale of the bonds is at the highest price obtainable therefor; and avers that if such bonds were sold as required by law, to the highest bidder, at open and public sale, after thirty days' notice in at least two newspapers of general circulation in Cuyahoga county, setting forth the nature, amount, rate of interest and length of time the bonds have to run, the same would bring a price equal to the face of said bonds and accrued interest thereon.

A motion for judgment on the pleadings being made by the defendants, the defendants can not be helped by the denials in the answer or by affirmative allegations in the answer that are denied by the reply.

Section 4514, General Code, requires the trustees of the sinking fund to invest the moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and to hold in reserve only such sums as may be needed to carry out the purposes of their trust.

Section 3922, General Code, directs that when a municipal corporation issues its bonds it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, and then it provides for offering them to certain other officials in case the trustees of the sinking fund decline to take them. The statutory duty thus placed upon the municipality to first offer its bonds to the trustees of the sinking fund indicates very clearly an intent upon the part of the Legislature to encourage the investment of the funds in the hands of the sinking fund trustees in the bonds of that municipality. It was by virtue of the two sections of the General Code just cited that the trustees of the sinking fund of the city of Cleveland came into the ownership and possession of the bonds in controversy.

Section 4517, General Code, requires the trustees of the sinking fund to have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all final judgments against the corporation, except in condemnation of property cases. This section imposes a clear and positive duty upon the trustees of the sinking fund to be prepared to pay the obligations of the municipality, whether arising out of a previous issue of bonds or by reason of a final judgment against the city. Upon the faithful performance of this duty by such trustees depends the financial credit of the city. The same section which imposes this duty further provides that "for the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession." This clause of Section 4517 confers a very broad power and discretion upon the trustees, a power and discretion that should be sufficiently broad to enable them to faithfully perform the duty imposed upon the trustees by the first clause of the same section.

1916.]

Cuyahoga County.

It is not contended by the plaintiffs that the sinking fund commission is precluded from selling in good faith, without any restrictions, any of the securities of the sinking fund other than bonds issued by the municipality itself; but it is contended that bonds of the municipality held by the sinking fund commission can not be so sold. It is alleged in the petition and is said by counsel for plaintiff in argument that when the bonds of the city are purchased by the sinking fund commission, such purchase is in legal effect a retirement of such bonds. If this be true, it would follow that if the sinking fund commission invested its funds in no other securities than bonds issued by the municipality, it would have no assets that could be made available for the satisfaction of judgments or other obligations of the city under the supervision of the sinking fund commission. If bonds of the municipality that were purchased by the sinking fund trustees thereby became retired there would be no purpose in the issuing of the bonds at all, for the improvement for which they were issued might as well be paid for by an appropriation from the sinking fund in the first instance. This method of procedure would obviously preclude the accumulation of a sinking fund and defeat the entire purpose of establishing such fund. This is a situation that could not have failed to present itself to the minds of the Legislature in framing the law as it did. Of course, the purpose of establishing a sinking fund is inconsistent with the proposition that improvements might be paid for in the first instance by an appropriation from that fund. If the legal effect of purchasing the bonds of a municipality by its sinking fund commission is to retire said bonds, then they should be canceled, for they would be the same as bonds that had never been issued and there is no statutory authority for the sinking fund commission to issue bonds of the municipality in the first instance. We therefore find that the purchase of the bonds of the municipality by its sinking fund trustees or commission does not in legal effect amount to a retirement of such bonds. Such bonds when purchased by the sinking fund commission become assets in the hands of such commission the same as other securities purchased by it.

The only authority of the sinking fund trustees to issue bonds is conferred by Section 4520, General Code, which provides that for the purpose of refunding, renewing or extending the bonded debt at a lower rate of interest, or for certain other special purposes, the trustees may issue bonds of the corporation as provided in that section. It is provided by Section 4522, General Code, that such bonds issued by the trustees of the sinking fund "shall be sold as provided by law for the sale of bonds by a municipal corporation." The provisions of law for the sale of bonds by a municipal corporation are found in Sections 3923, 3924 and 3926, General Code, which sections provide, in substance, that such bonds shall not be sold for less than their par value and that they shall be sold to the highest and best bidder after thirty days' notice in two newspapers, etc., as set forth in those sections.

It is alleged in the petition and argued that the commission has no authority to sell such bonds for less than their par value. Plaintiff claims that the last clause of Section 3923, General Code, which reads, "in no case shall the bonds of the corporation be sold for less than their par value, nor shall such bonds when so held for the benefit of such sinking fund or debts, be sold, except when necessary to meet the requirements of such fund or debt," precludes a sale by the commission at less than par. Let it be borne in mind that this clause—in fact, this section—is a part of Section 97 of the municipal code, passed in 1902 (96 O. L., 52), and relates to the issuing and selling of bonds by a municipality. The limitation that the bonds shall in no case be sold for less than their par value plainly applies to and affects the initial issue and sale of bonds. It follows the provision that the municipality shall first offer the bonds to the trustees of the sinking fund and then to certain other officers (now Section 3922, General Code), and the provision that only after the refusal of all such officers to take the bonds shall they be advertised for public sale. The limitation that the bonds when held for the benefit of the sinking fund or debts shall not be sold except when necessary to meet the requirements of the fund or debts, seems to be distinct and apart from that which

1916.]

Cuyahoga County.

provides that the bonds shall not be sold for less than their par value. The only limitation imposed when the bonds are held for the benefit of the sinking fund is that they shall not be sold except when necessary to meet the requirements of such fund or debt.

We are unable to find that Section 3923, General Code, controls or limits the power conferred upon the sinking fund trustees by Section 4517, General Code, to use or sell any of the securities in their possession for the satisfaction of any obligation under their supervision. It is entirely plain that Section 4522, General Code, is no limitation upon Section 4517, General Code, because, as already noted, that section is dealing only with the issuing of refunding bonds by the trustees. Sections 4517 and 4522, General Code, were Sections 110 and 115, respectively, of the municipal code. It is significant, we think, that Section 110 of the municipal code conferred upon the trustees of the sinking fund the apparently unlimited power to sell or use any of the securities or money in their possession for the satisfaction of any obligation under their supervision, and that Section 115 provided that in the issuing of refunding bonds they should be sold "as provided in Section 97 of this act," being now amended so as to provide that they "shall be sold as provided by law for the sale of bonds by a municipal corporation." The fact that in the same act a limitation was put upon the sale of refunding bonds issued by the trustees of the sinking fund and not upon the sale of other securities in their possession for the satisfaction of any obligation under their supervision, indicates that the Legislature intended that no limitation should be imposed in the latter case, and that they should have the fullest power to protect the credit of the city by the unlimited authority to use the money and securities in their possession for that purpose. The case of *City of Cincinnati et al v. Guckenberger*, 60 Ohio St., 353, is not in conflict with this conclusion.

It follows from what has been said that the sinking fund commission is not required to publish notice of the sale of the bonds for thirty days as required by statute in the case of the sale of bonds by a municipality, and that it is not precluded from selling the bonds at less than par.

It is said that this construction of the law would open the door to fraud; that if the city found it could not sell its bonds at par as required by law, they might be taken over by the sinking fund commission and by that commission sold below par. If such a state of facts could be shown to exist it would indicate fraud and an attempt to circumvent the provisions of the law providing for the sale of bonds by a municipality.

Every officer is expected and required to perform his official duties with integrity. Section 3923, General Code, reading, "only after the refusal of all such officers to take all or any of such bonds at par and interest, *bona fide* for and to be held for the benefit of such corporation, sinking fund or debt," etc., is a declaration that the sinking fund commission must act in good faith for the benefit of the city sinking fund in the purchase of the municipal bonds.

If facts were alleged showing an attempt on the part of this city and its sinking fund commission to circumvent the law in respect to the sale of bonds by the city, the power of a court of equity might be invoked to prevent the consummation of such a sale. No such facts are alleged to exist in the case under consideration.

It is alleged and argued that the recitation in the resolution adopted by the sinking fund commission on October 22, that for the purpose of accumulating funds to meet the obligations of the sinking fund there be offered for sale bonds owned by the sinking fund commission, does not state the real purpose of the commission in offering the bonds for sale. It is further alleged that when the bonds are sold the sinking fund commission will use the funds, at least in part, for a different purpose. We scarcely need cite authorities to the effect that if the act proposed to be done is legal the motive which prompts the act is not material. We find that the sinking fund commission is empowered to sell its assets, to-wit, the bonds in question, for the purpose of meeting the obligations of the sinking fund as proposed. If, after obtaining the proceeds of this sale, it should attempt to make an unlawful use of the funds, it would then be the proper time to proceed to restrain a wrongful disposition of such funds.

1916.]

Hamilton County.

The motion of the defendant is granted and a decree will be entered accordingly.

Petition dismissed.

KINKADE, J., and RICHARDS, J., concur.

DEMURRAGE ON CARS "BUNCHED" DURING A FLOOD.

Court of Appeals for Hamilton County.

THE JOSLIN-SCHMIDT COMPANY V. THE BALTIMORE & OHIO
SOUTHWESTERN RAILROAD COMPANY.*

Decided, February 28, 1916.

*Railways—Demurrage Not Recoverable—Where Cars, Constructively
Delivered, Were Not in Fact Placed—Owing to the Delay and Con-
fusion Caused by a Great Flood.*

Consignees who are bound under the "average agreement" rule for demurrage charges on cars constructively delivered, notwithstanding the "bunching" of such cars, are relieved therefrom where the bunching was not due to the act or neglect of some railroad company, but was wholly due to conditions prevailing during a great flood.

David S. Oliver, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, contra.

JONES (E. H.), P. J.

In this action a petition in error is filed to reverse a judgment of the Superior Court of Cincinnati, in which court the case was submitted, without pleadings or process, on an agreed statement of facts in accordance with the provisions of Section 11472 of the General Code of Ohio. Upon the agreed statement of facts the superior court being of the opinion that plaintiff below, the Baltimore & Ohio Southwestern Railroad Company, was entitled to recover, rendered judgment for plaintiff. The question presented to us, therefore, is purely one of law.

*Motion to require the Court of Appeals to certify its record overruled
May 29, 1916.

The railroad company by the proceeding below recovered a judgment against the Joslin-Schmidt Company for \$364, with interest, such sum having been found by the court upon the agreed statement of facts to be due the railroad company for demurrage charges which were made by the railroad company against the consignee for failure to unload its cars within the prescribed time.

It appears that the railroad company had published in accordance with law a set of "Car Demurrage Rules," a copy of which appears as "Exhibit A" attached to the agreed statement of facts. From these rules it appears that the railroad company in order to encourage the speedy unloading of cars offered to enter into an agreement with consignees by which they should receive credit for cars unloaded within twenty-four hours instead of using the forty-eight hours free time allowed under demurrage rules. Such an agreement had been entered into between the parties to this action, and a copy of same is attached to the agreed statement of facts as "Exhibit B."

We now quote the following from the agreed statement of facts:

"Thereafter, during the months of April, May and June, 1913, there were shipped to the defendant, over the lines of the Chesapeake & Ohio Railroad Company, the Louisville & Nashville Railroad Company, and other railroad companies, various shipments of coal and other commodities; the dates of the shipment of the same, the dates of the arrival of the same at Cincinnati, the dates when the same were constructively placed in accordance with the terms of said tariff, the dates when the same were actually placed, and the dates when the same were released, will all appear by the tabular statement which is hereto attached, marked 'Exhibit C,' and made part hereof with the same force and effect as if the same were herein set out at length.

"The said cars were bunched in transit or at destination, and were delivered by plaintiff in accumulated numbers in excess of daily shipments, but the said bunching did not occur through any fault of any railroad, the same having been caused wholly by the conditions created by the flood of March, 1913, and the confusion and delay of traffic incident thereto and to the results thereof."

1916.]

Hamilton County.

By paragraph 2 of section (b) of Rule 8 of said "Car Demurrage Rules" it is provided:

"2. *Cars for unloading or reconsigning.* When as the result of the act or neglect of any railroad, cars destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by this railroad in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to railroad company's agent within 15 days."

By virtue of this provision in the Car Demurrage Rules there would have been no liability for demurrage charges in this case, but by the provisions of the so-called "average agreement" entered into by these parties this exemption from demurrage was waived on the part of the Joslin-Schmidt Company by the following language:

"(c) A shipper or receiver who elects to take advantage of this average agreement shall not be entitled to cancellation or refund of demurrage charges under Section A, paragraphs 1 and 3, or Section b of Rule 8."

So it will be seen that if the "bunching of cars" in the yards at Ivorydale had been admittedly due to any act or neglect of any railroad company the Joslin-Schmidt Company would be bound by the paragraph above quoted from the "average agreement" by which it waived any exemption from the provisions of the car demurrage rules. But the cars for which demurrage is here claimed arrived in bunches at the rate sometimes of six or seven a day, and in many instances over a month after they were billed or shipped. They came in without any reference to the order in which they were shipped, without any rule or regularity, and in numbers far in excess of the capacity of the private track used by the Joslin-Schmidt Company for unloading.

This claim for demurrage, it might be added, is largely based upon the constructive placement rule, which will be found designated as "Rule 5" in the "Car Demurrage Rules," and reads as follows:

"RULE 5.**"Placing Cars for Unloading.**

"(a) When delivery of cars consigned or ordered to any other than public-delivery tracks or to industrial interchange tracks can not be made on account of the act or neglect of the consignee, or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The railroad company's agent must give the consignee written notice of all cars he has been unable to deliver because of the condition of the private or interchange tracks, or because of other conditions attributable to consignee. This will be considered constructive placement."

After careful examination of the rules and agreements binding these parties, which are above briefly referred to, we are of the opinion that there is an absence of any obligation express or implied upon the Joslin-Schmidt Company to pay these demurrage charges. Paragraph 2 of Section (b) taken from Rule 8 of the Car Demurrage Rules, *supra*, is limited in its effect to bunching occasioned by the act or neglect of some railroad company; therefore it is only a situation thus created that can be affected by the express waiver contained in the "average agreement." The agreed statement of facts herein expressly removes this case from the control of said provisions. The parties have stipulated, as shown above, that these cars were delivered "in accumulated numbers in excess of daily shipments, but the said bunching did not occur through any fault of any railroad, the same having been caused wholly by the conditions created by the flood of March, 1913, and the confusion and delay of traffic incident thereto and to the results thereof." This is the only reference in the agreed statement of facts to the flood of 1913, and it is not expressly stated here that said flood was an "act of God"; but the stipulation that the delay and confusion and the bunching was caused wholly by the flood is equivalent to saying that it was caused by an agency over which the parties, nor any earthly power, had any control.

We think, therefore, that we are justified in holding upon the agreed statement of facts that the delays in shipment and the so-called bunching of the cars was an "act of God." The flood of

1916.]

Hamilton County.

March, 1913, has been many times held to have been an "act of God," and in the absence of any stipulation that it was, we are inclined to think that courts in the Ohio and Miami valleys might take judicial notice to that effect. The delays through "act or neglect of any railroad" referred to in the Car Demurrage Rules are manifestly such delays for which a derelict company might be made to respond in damages. The delays which we are called upon to consider in this case are not such as they. Such delays as occurred from this flood are nowhere mentioned in the rules or in the accompanying agreement, and there is nothing to show that delays occasioned by an "act of God" were in contemplation of the parties. It would be a harsh rule which would relieve one party on account of "an act of God" and at the same time permit it to penalize the other on account of delay and damage resulting from the same cause.

For the reasons thus briefly stated the judgment will be reversed, and judgment entered here for plaintiff in error.

JONES (Oliver B.), J., and GORMAN, J., concur.

**CONTEMPT PROCEEDINGS CAN NOT BE REVIEWED BY
HABEAS CORPUS.**

Court of Appeals for Hamilton County.

IN RE APPLICATION OF HENRY S. ROSENTHAL FOR WRIT OF
HABEAS CORPUS.*

Decided, November 22, 1915.

*Contempt—Where Court Has Jurisdiction—Proceedings in Contempt
Can Not be Reviewed by Habeas Corpus.*

Inasmuch as the Superior Court of Cincinnati had jurisdiction to try the case in which the petitioner herein was committed for contempt, its proceedings can not be reviewed by habeas corpus however irregular or erroneous they may have been.

*Petition dismissed in the Supreme Court without opinion, at costs of Henry S. Rosenthal, February 15, 1916.

C. W. Baker, for Rosenthal.
Hosea & Knight, for Sheriff.

PER CURIAM.

The Superior Court of Cincinnati has jurisdiction to punish for contempt of court by inherent right and under Sections 12136 and 12137 of the General Code. It had jurisdiction to try the cause on hearing in which Rosenthal was committed for contempt of court. Whether testimony in that cause was properly being heard on the 5th and 6th days of November when it had previously been continued until the 12th of November raises a question merely as to the regularity and correctness of the proceedings. No matter how irregular and erroneous its proceedings may have been, they can not be reviewed by habeas corpus. A writ of error is the appropriate remedy. A writ of habeas corpus can not be used to perform the office of a writ of error. *In re David Fusfield, David Ostend and Nathan Carl*, 21 C.C.(N.S.), 62; *Ex parte Shaw*, 7 O. S., 81; *Ex parte Van Hagen*, 25 O. S., 426; *McGorray v. Sutter*, 80 O. S., 400.

The court of common pleas was without jurisdiction to entertain the habeas corpus proceedings in this case, and its judgment must therefore be reversed.

1916.]

Hamilton County.

TENANT IN POSSESSION UNDER A WRITTEN LEASE.

Court of Appeals for Hamilton County.

WILLIAM S. WALKER V. HERMAN BUMILLER.*

Decided, May 15, 1916.

Landlord and Tenant—Written Lease for One Year—Tenant Holding Over Becomes Bound for Another Year—Parol Contract for New Lease from Month to Month Within the Statute of Frauds—Corbin v. Hafer, Reversed by the Supreme Court Without Opinion, Not Followed.

1. When a tenant under a written lease for one year holds over after the expiration of his lease, he impliedly holds as a tenant for another year, at the option of the landlord, under the same terms and conditions as in the original lease.
2. A parol contract for a new lease from month to month, between landlord and tenant in possession under an existing lease by the year, is within the statute of frauds unless the possession and holding after the expiration of the first lease is distinctly referable to the new contract and not to a continuance under the original lease.

*Edward H. Brink and Chas. B. Wilby, for plaintiff in error.
Dempsey & Nieberding, contra.*

JONES (Oliver B.), J.

The question to be determined in this case is the validity of a parol agreement between a landlord and tenant made while in possession under a written lease for one year, which attempts to create a new lease from month to month after the expiration of the original term.

It is admitted that the defendant held over, but he alleges that while in possession under his written lease for a year, he by an oral arrangement with plaintiff agreed to continue after the termination of that lease to hold as a tenant from month to month at the same rental. Such an agreement is within the statute of frauds (Sections 8620 and 8621, General Code). It is a contract for an interest in or concerning lands and must be in writing to be valid.

A familiar exception to the rule, that an oral letting of land is invalid under the statute of frauds, is where the agreement is

*Affirming the parallel case of *Long v. Kahn*, 18 N.P.(N.S.).

carried out by the delivery of possession thereunder, thus taking it out of the statute by part performance.

But it has been clearly held that a parol agreement to take effect at once or in the future, for a lease between a landlord and a tenant in possession under a previous letting is within the statute of frauds and can not be enforced, and evidence will not be admitted in support of such a contract.

The earliest case in Ohio in which the Supreme Court has spoken on the subject is *Armstrong v. Kattenhorn*, 11 Ohio, 265, a leading case frequently cited with approval, in which the syllabus is as follows:

“A parol contract for a lease between landlord and tenant in possession, under a prior lease, is within the statute of frauds; unless possession be held solely under, and in performance of the parol contract, the terms of holding, clearly indicating the possession to be under the subsequent parol lease.”

And in the opinion, the court say:

“But, if possession be relied upon, it must be clearly referable to the contract, and be delivered and held in performance of it.

“Possession must give the contract life, and if they can possibly be separated, the parol agreement perishes under the operation of the statute.

“Hence, if the possession can be referred to any other source, than the parol contract, which it is claimed to support, even to the wrongful act of the party in possession, or to a different contract, the statute applies.

“* * * So with a tenant in possession, in case of a parol agreement for different terms of holding, if no acts are performed which clearly show that the possession is continued under the last agreement, it will be referred to the original tenancy, and such parol contract will be void.

“In the case now under consideration, the record shows no act that is not as clearly referable to the possession under the old tenancy, as the parol lease upon which recovery is sought.

“If it be contended that rent was paid under the parol contract, it may be replied, from aught that appears in the record, that the same rent was due on the original tenancy, under which the defendants were in possession.

“The possession of the defendants, then, is not shown, by unequivocal acts, to have been continued or held solely in performance of the parol contract, and must be referred to the prior lease.

1916.]

Hamilton County.

“Possession must accompany the contract, in performance of it, in all cases, to avoid the statute.”

In the instant case there was nothing to distinguish the possession of the tenant from a mere continuance—a holding over under the original lease, the rent being the same and no change apparent in the relation of the parties.

In the case of *Crawford v. Wick*, 18 O. S., 190, the first proposition of the syllabus reads:

“A parol contract for a new or supplemental lease between a landlord and his tenant, in possession under a former and subsisting lease, is within the statute of frauds; and the continued possession of the tenant does not take the parol contract out of the operation of the statute, where the continued possession of the tenant is as well referable to the first lease as to the second parol lease. *Armstrong v. Kattenhorn*, 11 Ohio, 265, followed and approved.”

In the opinion of the court in *Myers v. Croswell*, 45 O. S., 543, commencing at page 547, the following language is used:

“Whatever objection may be urged against the doctrine of part performance of contracts within the statute of frauds, or be said of its tendency to promote frauds, or of the necessity for courts to make a stand against further encroachments on the statute, it is too well settled to be now open to dispute, that certain acts done in the part performance of verbal contracts for the sale of lands, may operate to take them out of the statute, and generally possession of the land delivered and received under and in pursuance of the contract amounts to such part performance. But it is equally well settled that to have that effect the possession must be connected with and in consequence of the contract; it must be in pursuance to its terms and in part execution of them. In other words the possession must pursue and substantiate the contract.

“In *Phillips v. Thompson*, 1 John Ch., 131, 149, Chancellor Kent says: ‘It is well settled that if a party sets up part performance to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from that agreement, such as the party would not have done unless on account of that very agreement, and with a direct view to its performance. There must be no equivocation or uncertainty in the case.’ ”

And on page 548, Pomeroy on the Specific Performance of Contracts, Section 108, is quoted as follows:

“A plaintiff can not, in the face of the statute, prove a verbal contract by parol evidence and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself or on his behalf which point unmistakably to a contract between himself and the defendant, which can not, in the ordinary course of human conduct be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance can not of themselves indicate all the terms of the agreement sought to be enforced, they must be consistent with it and in conformity with its provisions when these shall have been shown by the subsequent parol evidence. It follows from this invariable rule, that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of a contract do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties.”

And then the rule in Ohio is stated as announced in *Armstrong v. Kattenhorn*.

In *Clark v. Guest*, 54 O. S., 298, which involved the question of an oral extension of time for the removal of standing timber under a previous written contract of sale thereof, the court says on page 305:

“Such verbal extension of time is as clearly within the statute as a verbal extension of a lease, which this court has held to be within the statute. *Armstrong v. Kattenhorn*, 11 Ohio, 265; *Crawford v. Wick*, 18 Ohio St., 190.”

And on page 306:

“The circuit court found as its conclusion of law upon the facts found, that it would be a fraud upon the defendant in error to revoke such verbal extension of time; and that the case was therefore taken out of the statute of frauds. This is not tenable. The statute was enacted to prevent frauds and perjuries. The law-making power knew that frauds and perjuries would be practiced with or without the statute, but it was

1916.]

Hamilton County.

thought that less harm would come from enacting and enforcing the statute, than otherwise. The only exceptions to the statute, engrafted therein by judicial interpretation, if not by judicial legislation, that can be justly defended, are cases in which the acts of both parties are such as to imply a contract with substantially the same certainty as would be shown by a written memorandum, as in the case of a verbal sale of lands followed by a delivery of possession to the purchaser, and valuable permanent improvements made by him with the knowledge of the vendor.

“To say that to refuse to carry out a verbal purchase of standing growing trees is a fraud on part of the owner of the trees, is to disregard the statute, and in effect a repeal thereof. * *

* He had no legal right to rely upon the verbal contract, and where there is no right there can be no fraud. If he intended to rely upon the extension of time he should have caused the contract therefor to be reduced to writing. The statute was enacted to protect men in their property rights and it should be enforced unless in cases clearly within some of the well established exceptions.”

The rule in Ohio as to a tenant holding over is laid down in *B. & O. R. R. v. West*, 57 O. S., 161, the last two clauses of the syllabus being as follows:

“Where, after the expiration of the term, the tenant holds over and pays rent for a part of another year, without any new agreement with the landlord, he becomes a tenant for that year at the same rent, and can not terminate the tenancy before the end of the year without the landlord’s consent.

“The obligation of the tenant to pay the rent for the year, in such case, is not within the statute of frauds; the holding over being equivalent to a new entry.”

And in the opinion, on page 168, the court say:

“The tenant, by holding over, is regarded as consenting or proposing to enter upon a new term for another year at the same rent and upon the conditions of the prior occupancy, and the landlord’s acceptance of the proposed tenancy is presumed from his receiving the rent, or other acquiescence. The agreement arises by implication of law from the conduct of the parties after the expiration of the former tenancy; and, in this respect, is essentially different from those agreements made by parties while in possession under an existing lease, for a new lease to commence in the future; as was the case of *Armstrong v. Kattenhorn*, 11 Ohio, 265, and *Crawford & Murray v. Wick*, 18 Ohio St., 190.”

This language is quoted with approval in *Gladwell v. Holcomb*, 60 O. S., 427, in which case the law is thus stated in the syllabus:

“When the tenant holds over after the expiration of any year, the landlord has the option to treat him as a tenant for another year, or as a trespasser; and unless there has been an election to treat him as a tenant, possession may be recovered by the landlord in an action of forcible detention, after the service of the three days’ notice required by the statute.

“A parol agreement for a lease to commence in the future, with a person already in possession of the premises as a tenant, is within the statute of frauds.”

In the case of *Strong v. Schmidt*, 15 C. C., 233, which involved a question of surrender, the court said in its opinion, pages 238 and 239:

“The testimony clearly shows that the defendant was in possession under a written lease. He refused to sign a new lease for the reason that he was not satisfied with its terms. He wrote letter to the other parties, saying that he would hold from month to month, and stated that orally, perhaps to the agent. The parties themselves, instead of consenting to that, answered that they would not consent. So that we have the terms, so far as any writing is concerned. We have a proposition to hold on different terms, with a refusal on the part of the landlord and under that state of facts the defendant continued in possession. There was no change in possession, nor did the landlord in any manner or form recognize that there was a holding over under different terms than those of the lease. We see no reason whatever why the statute of frauds does not apply here and we think that all the evidence in regard to the statements made by the defendant as to how he would hold or in what manner was entirely irrelevant and illegal. •

“The rule of law is—it is said that the presumption of law is, that he holds under the former contract from year to year. The language is varied by different courts in delivering the opinions: by some it is said to be a ‘presumption,’ by some it is said to be an ‘implied contract,’ and by some it is said to be a ‘constructive contract;’ but no matter what it is called the law clearly is, that where the party has continued in possession after the termination of a year’s lease and the landlord has accepted rent from him, that the lessee holds for another year, and that the same is as binding and obligatory upon both parties, as it would be if re-executed. The landlord can not evade it, only at the expira-

1916.]

Hamilton County.

tion of the year, nor can the tenant leave possession of the premises. He is likewise bound to pay rent for the year. If he chooses to leave the premises, his obligation still remains to pay. It is a binding contract. That contract can only be set aside in some manner that has reference to the law of the land. There are two and perhaps three ways in which it can be set aside; a new contract may be made, and there may be a surrender of the premises; but the new contract, in order to be binding, must be either a contract in writing under the statute of frauds, or it must be, if a parol contract, in pursuance of a change of possession, as the Supreme Court has said, which makes a new and binding contract."

And in *Schneider v. Curran*, 19 C. C., 224, the same doctrine was recognized in the syllabus, as follows:

"A parol contract for a lease between landlord and tenant, and the tenant in possession under a prior verbal lease, is within the statute of frauds and void, and the continued possession alone of a tenant does not take such contract out of the operation of the statute; there must be a new possession taken to do this."

Notwithstanding the clear and unqualified words of the statute, G. C., 8620, 8621, and the reported decisions shown in the long line of authorities in this state, none of which have been in any way questioned, it is now claimed that the settled rule is to be changed because of the case of *Moore v. Harter*, 67 O. S., 250, and the unreported case of *Corbin v. Hafer*, 72 O. S., 685, which reversed the decision of the superior court in general term, *Hafer v. Corbin*, 6 N.P.(N.S.), 468. The trial judge in the instant case felt himself bound by this unreported case. In passing on the motion for a new trial, he said:

"Whatever may have been the law in this state on this question, it certainly was changed by the ruling of the Supreme Court in the case of *Corbin v. Hafer*, 72 O. S., 685. In that case the same question as that presented in the case at bar was decided. The general term held such agreement void. * * * The Supreme Court reversed this and entered judgment for the defendant. * * *

"Believing myself bound under the rule of *stare decisis* to follow the Supreme Court the motion for a new trial on this point is overruled."

It is true as shown by the report in 6 N.P.(N.S.), 468, that the question now before this court was involved in *Corbin v. Hafer*. But the Supreme Court did not desire to make the decision of that case a rule of law to control future cases. No opinion was written and the court thus refrained from disturbing the authority of any of the cases cited above beginning with *Armstrong v. Kattenhorn*. We have been frequently admonished by the Supreme Court itself that an unreported case can in no wise be regarded as an authority and, *a fortiori*, that rule must be held to prevail where as in this case to hold otherwise would have the effect of changing decisions that have been repeated time and again by that court for more than seventy years, without having a single line announcing such change or giving any reason for it.

But it is contended that, as the court based its action in *Corbin v. Hafer* on the authority of *Moore v. Harter*, 67 O. S., 250, this action must be regarded in the same light as a reported decision extending the exception to the general rule announced in that case. In *Moore v. Harter* a landlord had advised his tenant before the expiration of his term that the rent for the succeeding year would be increased fifty dollars if he held over. The tenant did hold over, and the terms and conditions of the original lease were held to be modified as to the rate of rental, in accordance with that notice. The court say (67 O. S., 254) in the opinion:

“The tenant’s dissent from the terms proposed by the landlord amounts to nothing unless the latter accepts it, because the presumption is that one holding over, after notice from the landlord that a change of terms would be required, is presumed to do so on the terms proposed by the landlord. Otherwise he would put himself in the wrong and would be liable to be treated as a trespasser.”

And the court distinguished *Armstrong v. Kattenhorn* as not pertinent to that case, because the landlord owned the property and had an absolute right to fix the rent, and the rights of the tenant expired with his lease, unless a new term was created by his holding over, under *R. R. Co. v. West*, 57 O. S., 161, in which event the new term would be under the increased rent.

1916.]

Hamilton County.

A careful reading of *Moore v. Harter* will show that the question there decided does not apply to *Corbin v. Hafer*. And the mere reference to it as an authority in the list of unreported cases in 72 O. S., 685, can not be held to extend that decision so that it will apply. To do so would in effect wipe out the statute of frauds entirely as between a landlord and a tenant in possession. A tenant once in possession could, regardless of the statute, fasten any kind of a lease upon the landlord if he could only secure the necessary witnesses to show a parol contract.

Since the decision of *Corbin v. Hafer*, 72 O. S., 685, at least two decisions have been announced which recognize no change in the established rule: *Hopkins v. Carroll*, 11 C.C.(N.S.), 605; *Rickard v. Utter*, No. 619, Court of Appeals of Hamilton County, decided by the judges of the sixth district, Chittenden, J., writing the opinion.

The language of Redesdale, Lord Chancellor, in *Lindsay v. Lynch*, 2 Sch. & Lef., 4, quoted in the argument of counsel in the report of *Armstrong v. Kattenhorn*, 11 Ohio, 267-8, is especially applicable to the situation here:

“I am not disposed to carry the cases which have been determined on the statute of frauds any further than I am compelled by former decisions. The statute was made for the purpose of preventing perjuries and frauds; and nothing can be more manifest, to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would, probably, have been, that fewer instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas, it is manifest that the decisions on the subject have opened a new door to fraud; and that, under pretense of part execution if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation, that, without departing from its rules, it feels obliged to break through the statute.”

The majority of the court are unwilling because of an unreported case to read into a reported decision such an extension of the exception to a general rule as will in effect overrule at least four well considered decisions of the Supreme Court of acknowledged authority. We can at least know what they decide, and

we feel bound to follow them rather than to conjecture that they have been displaced, modified and overruled by an unreported case.

Indeed this has been distinctly declared to be the proper course, in *Louden v. Cincinnati*, 90 O. S., 144, in the opinion of the court at pages 157 and 158, where the court practically admitted that the question under discussion had been given a contrary decision in the case of *Armstrong v. Cincinnati*, 12 C.C. (N.S.), 76, which had been affirmed without report by the Supreme Court in 82 O. S., 454. But no weight was given to this unreported decision; after suggesting that the reason for its affirmance may have been the fact that the weight of evidence was involved, the court say:

“The law of this state in reference to this subject having been declared in the case of *City of Tiffin v. McCormack* (34 O. S., 638), and *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* (60 O. S., 560), it would follow that if this court intended to depart from the doctrine announced in these cases it would have reported the case and overruled these authorities.”

The doctrine of *stare decisis* requires that rules of law when clearly announced and established by a court of last resort should not be lightly disregarded and set aside, but should be adhered to and followed. Proper judicial subordination requires that this court should be governed by the written decisions of the Supreme Court, and it is not at liberty to modify or extend clearly defined doctrines laid down in reported cases on some presumption that they may have been changed by reason of some unreported case. If a decision of the Supreme Court is to be overruled or modified, it must be done in distinct terms by the written decision of that court, and can not be implied from the judgment in an unreported case.

The salutary effect of the statute of frauds has long been demonstrated, and it should be sustained in full force while it remains a part of our statute law. If it is desired to modify or repeal it, that can be done by the General Assembly, and judicial legislation should not be invoked to extend the exceptions already engrafted upon it by decisions of any court other than that of last resort.

1916.]

Hamilton County.

The judgment of the court of common pleas is therefore reversed and the cause remanded.

JONES (E. H.), P. J., concurs; GORMAN, J., dissents.

GORMAN, J., dissenting:

I find myself unable to concur in the conclusion reached in this case by my associates, for the following reasons:

The question presented in this case for our consideration is: Can a binding parol agreement be made between landlord and tenant while the tenant is in possession of the premises under a written lease for one year and before the expiration of the term, whereby the term of the holding is changed to a tenancy from month to month?

The defendant occupied the premises belonging to the plaintiff in error under a lease for one year. Defendant in error claims that before the expiration of the year he made a verbal agreement with the plaintiff in error that he might hold from month to month, after the expiration of the year, upon the payment of the same monthly rental until such time as he desired to vacate the premises. Plaintiff in error, who was defendant below, denied that such an agreement was made.

The tenant, defendant in error, vacated the premises after occupying them thirteen months, and at the end of the second year the landlord, the plaintiff in error, brought suit to recover the difference between the amount of the rent which would be due under the lease, and the amount of rent which he received upon a re-letting of the premises. The landlord, Walker, rented the premises for a part of the year and received \$291.67, while the rental under the lease was to have been \$440 for eleven months; and the action was to recover the difference—\$148.33.

Upon the trial of the case the court admitted evidence of the parol agreement between the landlord and tenant, over the objection of counsel for plaintiff.

The court charged the jury in substance that if they should find that the landlord and tenant had made a parol agreement while the tenant was in possession under the lease, the tenant might after the end of the year continue as a tenant from month

Walker v. Bumiller.

45(N.S.)

we feel bound to follow them rather than have been displaced, modified and in this case.

Indeed this has been distinguished in course, in *Louden v. Cincinnati* the court at pages 157 and 158 admitted that the question presented was a contrary decision in the

(N.S.), 76, which has been affirmed by the Supreme Court in 8

unreported decisions. The affirmance in this case was involved

that had paid the premises, they were in charge was and a verdict in error.

Attending the evidence of defendant and in

.. *Hafer*, 72 O. S., 685, the

general term reversed and that of special authority of *Moore v. Harter*, 67 O. S., 250."

"The case of *Corbin v. Hafer* as decided by the general term of the Superior Court of Cincinnati is found reported in 6 N.P. 638 (N.S.), 468, Judges Hosea, Ferris and Hoffheimer sitting. The facts in that case as shown in that report disclose a case identical with the instant case. In the trial of that case in the superior court in special term before Judge Rufus B. Smith, a verdict was returned in favor of the defendant and a judgment entered thereon. Corbin claimed to have made a verbal agreement with Hafer, while he, Corbin, was occupying the premises under a lease from year to year, whereby Hafer agreed that he, Corbin, could after the expiration of the year occupy the premises from month to month. Hafer denied that this agreement was made. Evidence was admitted by the trial court of the conversation between Corbin and Hafer that established the parol agreement for a holding from month to month. A special charge asked by Hafer to the effect that, unless the agreement as to the change of the terms of tenancy was in writing under the statute of frauds the agreement would be null and void, was refused and exception noted. In the general charge the court told the jury that if the agreement was established in parol and the rent was paid for the entire time that the tenant occupied the premises Hafer could not recover against Corbin for the remainder of the year, and an exception was noted. The general term reversed the special term and entered judgment in favor of Hafer for the amount of the rent due for the remainder of the year. These

Hamilton County.

be the only errors claimed to exist in this case, and the court having reversed the general term upon the *Moore v. Harter, supra*, we should look to that case at principle was involved in its decision.

Harter, 67 O. S., 250, a tenant was occupying a yearly lease from April 1, 1892, and without continuing to occupy the same until April 1, 1893, at \$450 per year. Before the expiration of the lease the landlord notified the tenant that the rent for the next year would be \$500 per year instead of \$450. The tenant held over without giving any notice, intention or intimation that he was dissatisfied with the increased rent. It was held that by holding over after being notified by the landlord that the rent would be increased from \$450 to \$500 a year the tenant became liable for the entire yearly rental at the increased rate of \$500. The syllabus of the case is as follows:

“When a tenant at the expiration of a written lease holds over as a tenant from year to year, upon the terms of the original lease, and the landlord notifies the tenant, before the beginning of another year, that if the latter holds over into another year the rent will be increased, and the tenant does so hold over, the terms and conditions of the original lease will be modified in respect to the rent so as to conform to such notice, but in all other respects they will continue to be applicable to the new tenancy. *Armstrong v. Kattenhorn et al*, 11 Ohio, 265, distinguished.”

On page 253 of this report the court says:

“It follows that the lessor and lessee may by agreement change the terms of the original tenancy; and, if, before the beginning of another year, the landlord notifies the tenant that the rent will be increased and the latter nevertheless holds over to another year, to that extent the terms of the original lease will not apply, but it will be applicable in all other respects. The reason of this is that the tenant must be presumed to have assented to the change. The authorities are numerous and conclusive on this point.” Citing several authorities.

On page 254 the court distinguishes the case of *Armstrong v. Kattenhorn*, 11 Ohio, 265, as follows:

“The doctrine of *Armstrong v. Kattenhorn* is that if the possession of the tenant ‘can be referred to any other source than the parol contract which it is claimed to support, even to the wrongful act of the party in possession, or to a different contract, the statute applies.’ The possession in that case was held to be ambiguous and as easily referable to the old lease as to the new one, and hence that the latter was within the statute of frauds and void. Although the statute of frauds declares that leases not in conformity with the statute shall be void, yet that will not prevent a periodical tenancy, subject to the terms of the original lease, from arising by taking possession under the invalid lease and paying rent in accordance therewith.” (Citing numerous authorities.) “And that is precisely that which was done in this case and in all the cases cited above as included in the same class. The continuing in possession, after notice from the landlord to the tenant that he could not do so except under prescribed conditions, is presumed to be a possession under the named conditions. It could not be referable to the former lease without showing that the landlord had consented to withdraw the conditions.”

In the case before us the rule which the trial court laid down was applied on a state of facts, the converse of the facts in the case of *Moore v. Harter*, *supra*. In *Moore v. Harter* the landlord stated the terms and conditions upon which the tenant could remain, and the tenant remained without making any objection, and it was held that by so doing he had agreed to the landlord’s conditions and acquiesced as it were, and was therefore bound. In the case before us the tenant made the proposition to the landlord that he would remain as a tenant only from month to month and the landlord agreed to this proposition. The tenant continued in possession after this for one month, and it appears to me that if the rule laid down in *Moore v. Harter* is applicable to the case of *Corbin v. Hafer* it must also be applicable to the case under consideration. The tenant and the landlord agreed verbally to a change in the terms of the lease, and the continued possession of the tenant is under the new parol agreement made between the landlord and tenant. It appears to me that if a parol agreement between landlord and tenant to increase the rent can be made while a tenant is holding under a written lease, then an agreement between the landlord and ten-

1916.]

Hamilton County.

ant to change the tenancy from a yearly to a monthly one can also rest in parol.

I apprehend that there is no special merit in a claim that a landlord only may make an oral proposition to modify the terms of a written lease, before the expiration of the term, which may be orally accepted by the tenant or accepted by the acquiescence and thus bind the tenant. Upon what rational grounds can it be claimed that a tenant under a written lease for a year may not make an oral proposition to his landlord during the term, to modify its terms as to the rent or duration of the term, which being accepted orally by the landlord will not bind the landlord? Shall there be a different rule of law applied to a tenant from that applied to a landlord? Can it be material whether the agreement between the landlord and tenant results from the landlord accepting verbally the tenant's oral offer, or the tenant verbally accepting the landlord's oral offer? It appears to me to be a case of tweedle-dum and tweedle-dee. If the holding over is referable to the oral agreement, then it must stand as the agreement of the parties regardless of whether the proposal came from the landlord or the tenant. The only question is: Did the minds of the parties meet in the oral agreement?

I would not rest my dissenting opinion upon the unreported case of *Corbin v. Hafer*, but I find that the principles laid down in *Moore v. Harter* upon the authority of which *Corbin v. Hafer* was reversed by the Supreme Court, apply to the facts in the instant case, and I come to the conclusion that the court of common pleas in the trial of the case below did not err in admitting the evidence complained of, showing the parol agreement between the landlord and the tenant; nor did the court err in its charge to the jury that they should consider the evidence of the oral agreement.

The jury having found against the landlord Walker, I can not say that the verdict is against the weight of the evidence. Nor indeed is it seriously claimed that this court should reverse the lower court upon the weight of the evidence, but only on account of the errors of the trial court in admitting the evidence of the parol agreement to change the terms of the tenancy, and in refusing to rule out that evidence after it was admitted, and in

charging that the jury might consider parol evidence as to the change of the terms of the tenancy.

It appears to me that under *Moore v. Harter* plaintiff is not required to show that the agreement for a change of the tenancy was in writing under the statute of fraud in order to make binding the agreement between landlord and tenant entered into while the tenant is in possession under a written lease from year to year or for any other term.

Jones on Landlord and Tenant, Section 210, page 250, in discussing this question uses the following language:

“But when the landlord has by his conduct led the tenant to believe that he will not be charged as tenant for the entire year, it is axiomatic that the landlord can not change his position and fix an unexpected burden of liability upon the tenancy. So it follows that any new agreement between a landlord and tenant relative to the continued occupancy of leased premises after the termination of the term precludes the landlord from charging the tenant with liability for a full year’s rent by reason of such continued occupancy.

“This result is not contingent on the fact that the new agreement is valid and capable of enforcement; it rests on an estoppel against the landlord for inducing the tenant to act on his representations. And it matters not that the new contract was invalid under the statute of frauds because not in writing.” (Citing *Singer Mfg. Co. v. Sayre*, 75 Ala., 270; *Crommelin v. Theiss*, 31 Ala., 412; contra, *Parker v. Hollis*, 50 Ala., 411.) “The continued payment and receipt of rent after the expiration of the term is not necessarily inconsistent with the existence of a new agreement between the parties.”

Without undertaking further to discuss all the authorities cited by counsel for the parties to this proceeding, I content myself with holding that under the authority of *Moore v. Harter*, 67 O. S., 250, approved in *Corbin v. Hafer*, 72 O. S., 685, a parol agreement may be entered into between landlord and tenant, during the term of a written lease for one year while the tenant is in possession under the lease, which modifies the terms and conditions of the lease, and the statute of frauds can not be invoked to nullify the parol agreement.

ABATEMENT OF PUBLIC NUISANCES.

Circuit Court of Cuyahoga County.

JOHN SCHUESZLER V. THE CLEVELAND, MEDINA & SOUTHERN
ELECTRIC RAILWAY COMPANY AND ALBERT R. GIBSON.

Decided, May 28, 1900.

Nuisances—One Suffering no Peculiar Injury May Not Abate a Public Nuisance.

One who suffers no peculiar injury from the existence of a public nuisance, such as a fence in a public highway, has no right to abate the nuisance, when it does not interfere with public travel in the highway.

Dickey, Brewer & McGowan, for plaintiff in error.

White, Johnson & McCaslin and *Hackney & Johnson*, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

We reverse this case and remand it for a new trial. At the beginning of the trial below admissions were made of certain facts by the attorney opening the case to the jury, and upon his statements taken as facts in the case, the court entered a judgment against the plaintiff below, who brings the action here to have it reversed.

The question was discussed here as to whether that is proper practice, but we find it unnecessary to say much on that subject. We have examined the bill of exceptions, which consists very largely of what the attorney said and what was stated on the other side in answer, and then the second statement by way of a reply made to the jury by the attorney for the plaintiff. The court supposed that the attorney had stated every fact necessary to be proved on the other side, that is, had admitted every fact in order to defeat the plaintiff, and that being true, the court entered judgment against the plaintiff.

The defendant in this action, the Cleveland, Medina & Southern Railway Company, was constructing its road along a highway at a point where a farmer had his fence a few inches or

perhaps a foot or two, in the highway, just as many farmers have their fences, and the railroad company undertook to take down the fence and put it back on the line where it should have been.

The farmer and his wife and his son-in-law, Schueszler, came out to defend the fence, and drove off the employees of the railroad company; thereupon the company had the parties arrested for obstructing the highway, under Section 6921, Revised Statutes.

Schueszler was cleared of the charge made against him, and brought this action for damages.

The statement made by the plaintiff's attorney in opening his case seems to admit, on behalf of his client, that the fence was in the highway; and that being true the court thought if that fact was established that it would justify the railroad company in putting it back upon the line. The statement included an allegation that the public had all of the highway it needed for any lawful purpose, and that the purpose for which the railroad company was proposing to use it was an unlawful purpose.

Now, whether that was unlawful or not we do not know. If this was a steam railroad, or a railroad in the nature of a steam railroad, there is no doubt but that an appropriation in the highway would be necessary before it could go upon the highway, while if it comes under the very noted Cumminsville case in 14 O. S., and is merely the usual mode of local traffic upon the highway, an appropriation may not be necessary; and we are unable to learn from this bill of exceptions which kind of a railway it is. There is no statement that shows which kind of a railway it is and no assumption can be made that it is one kind or the other. Even an electric road may come under the head of the case decided in 35 O. S., as a steam railroad. Electric roads are becoming of such length and of such a nature that there is a point somewhere where it becomes necessary for them to appropriate a right-of-way in the highway. Where the line is that marks the difference between a street railroad and a railroad that passes through the country for general traffic, we do not attempt to say. We have held, though, in another case

1916.]

Cuyahoga County.

that it was not necessary for this company to appropriate. But the proof was not very clear before us as to the character of the road they were going to build. It was insisted that the proof was sufficient to show that they were to have their tracks in such shape that no other person could possibly use it, as in the city, by driving upon it or crossing it except in such places as crossings are made. That case has gone to the Supreme Court, where, perhaps, some law will be determined as to the character of this road. But the evidence was not very clear upon that point and we held it the same as a street railway—that they had a right to pass without appropriation.

The law in regard to this fence, like many other nuisances that exist, is, that not every person who uses the highway has a right to abate the nuisance. If a man can travel upon the highway, as everybody else does, then because some one is trespassing upon the highway with a fence which does not interfere with his travel upon the highway, he has no right whatever to abate the nuisance. A man driving along and seeing a fence that does not interfere with him, has no right to get out and knock down the fence; there must be a damage to him that is peculiar to him and interferes with his proper use of the highway before he can interfere with such a nuisance. It is a matter that belongs to the public, to the officers that have been elected to look after these things. So that if the railroad is the kind of a one that has no right upon that street or road, then it had no right to interfere by knocking down that fence, even if it did interfere with the company, because it would be there itself without right as to the adjoining owners. And if that is true then it would have no right to undertake to take into its hands the law and abate the nuisance any more than a private individual would have. It is there simply as a private individual. Whether it has a right to use the street or not without appropriation, we do not know from this bill of exceptions. But it is said that this party is seeking to recover for damages for being arrested for a thing that he admits he did do, for he answers and admits that he was upon these premises. Schueszler is not shown to be the owner of the fence, and if he was there maintaining that fence at all it was simply in helping the owner to keep it there

and that was the only offense which could be charged against him. And the right of this railroad company to use the street must clearly appear before it has a right to arrest people for using the street by having their fences out in the highway. This fact of the right of the railroad company does not appear, and it is not necessary to pass upon other questions.

There are other cases pending below; and I would say that in our investigation of these we find that this man Schueszler stands in quite a different relation to this matter than does the man who puts his fence upon the highway and keeps it there; Schueszler did nothing more than to keep parties from tearing it down, and whether that party had any right to take it down or not, we do not know from the bill of exceptions and, because of that lack of knowledge, we hold that the court below had no right to enter judgment in this case.

INJURY THE RESULT OF OWN NEGLIGENCE.

Circuit Court of Cuyahoga County.

WILLIAM DOWNING V. THE CLEVELAND ELECTRIC
RAILWAY COMPANY.*

Decided, January 14, 1901.

*Negligence—One Driving in Dangerous Place on Highway from Choice,
Guilty of Negligence.*

Where approaching a sharp curve in the highway, one from choice and not from necessity, drives so close to a street car track that his wagon is struck by a car coming round the curve before he can turn out, his injury is the result of his own negligence.

*Winch & Thompson and J. H. Smart, for plaintiff in error.
Kline, Carr, Tolles & Goff, contra.*

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

*Affirmed without opinion, *Downing v. Railway Co.*, 68 Ohio State, 648.

1916.]

Cuyahoga County.

The plaintiff was injured in a collision between his wagon and a car belonging to the defendant company, upon the highway in the village of Euclid in Cuyahoga county.

He came into market the evening before the injury, and was driving out in the daytime. He himself was lying down in the wagon or reclining upon some boxes, and his daughter, a girl about fifteen years old, was driving the team. As they approached Euclid and were part way down the hill going north, they met a car, and the wagon and team and he himself were injured.

The highway at the point where he was injured is on a down grade going north and in it there is a curve curving to the west and on the concave part of this curve, just off the highway, are bushes growing. On the highway next to the bushes, on the south side, is the street railway track; next to that is a dirt track for teams, and still north or west of the dirt track is a plank road. Teams can drive either upon the plank or upon the dirt road.

It appears that the plank was somewhat out of repair at the time of this injury, but not so much that it could not be used in the ordinary modes of travel. The plaintiff was driving upon the dirt track of the highway, next to the railway track, and while going down the hill, a car approached from the village of Euclid and the wagon was so near the track that it was hit by the car and the injury complained of followed.

The allegations of negligence are: in not trimming up the trees and shrubs along the south side of said road, and allowing them to remain in that condition so that the approach of defendant's cars could not be observed; in failing to warn by sound of gong or other signal when approaching said curve; in running the motor and approaching the said curve at a high and dangerous rate of speed, well knowing the dangerous condition of the road at that point, and well knowing the difficulty of checking the speed or stopping the motor when going at such a high rate of speed; in not keeping a proper outlook for travelers, and in not reversing the motor, or even applying the brake until it was too late.

The defendant answered to these allegations, denying each one and any negligence on the part of the defendant in error, and averring that if the plaintiff received injuries, it was due to his own contributory negligence.

The case went to trial, and the court directed a verdict for the defendant, the railway company. The only grounds of error that plaintiff relies upon in this court are: that the court erred in directing a verdict for the defendant in error, which verdict was against the weight of evidence; and, second, the court erred in overruling the motion of the plaintiff in error for a new trial; and that the verdict was contrary to the law and the weight of the evidence.

The plaintiff in error contends that he had produced evidence tending to show that the defendant in error was guilty of one or all of the allegations of negligence in the petition. That this was a place where a car might suddenly appear upon a person traveling upon the highway without ability to see it before its approach, on account of the bushes that grew in the line of vision and that for that reason the railroad company should, upon approaching such a dangerous place, give some signal, and not rely upon persons traveling upon the highway seeing the car. And he claims, further, that he was traveling upon the dirt portion of the highway where he had a right to travel; and having a right to travel upon that portion of the highway, he was guilty of no negligence; and that having shown that the defendant in error was guilty of negligence that, instead of a verdict being directed by the court against him, it should have been submitted to the jury, and that upon the evidence as produced he was entitled to a verdict by the jury; and that by reason of this misdirection of the court, he was prejudiced and is entitled to have the judgment reversed and a new trial granted.

But as the evidence stood, it clearly shows that the plaintiff in error *knew* that he was liable at any moment to meet a car upon the track. He knew the dangerous character of the place and with this knowledge he drove his team, or permitted his daughter to drive his team, so near to the railroad track, that, when the car did approach and did come suddenly upon them,

1916.]

Cuyahoga County.

she was unable to get the team away from the track, if she had made any attempt to do so, in time to prevent the wagon being hit by the car.

It is true that plaintiff had a right to drive upon any part of the highway. He had the right to drive upon the railroad if he saw fit to do so; it is a part of the highway—and there is no law forbidding him to use any part of the highway. But a clear right may be exercised under such circumstances that the party will be guilty of his own injury when that occurs through a wrongful exercise of his rights and privileges.

While it was his right to drive upon the railroad track, yet he would be guilty of negligence if he drove upon the track at a point where he could not see a car approaching him at any distance ahead. And it was his right to drive upon the dirt part of the highway, but, knowing the dangerous character of the place and how suddenly he might be run down by a car, and knowing that he would be unable to see the car approach, it was his duty to drive so far from the track that, if the car did suddenly approach, his wagon would not be hit.

There is no reason assigned why he might not have done this as well as to drive as close to the track as he did. The only reason that might be assigned was, that the dirt road was a better road to travel upon than the plank, but the evidence shows that the dirt road was wide enough so that he could have traveled entirely upon that and yet have been out of reach of the car.

As the evidence stood at the time the judge directed the verdict, there was no contradiction in it whatever as to where the wagon was, how close to the track; as to the manner in which it was being driven; as to the fact that the plaintiff in error knew all the surroundings quite as well as did the railroad company; and yet he permitted his wagon to be driven so close to the track that it would be hit by a car if it approached at that point, and, in so doing, he was clearly guilty of contributory negligence, and, as the evidence stood, that became purely a question of law for the court, there being no contradiction in the evidence whatever. The facts leading up to the conclusion of contributory

negligence being all established without contradiction and without any controversy, the court had a right to conclude that there was contributory negligence on the part of the plaintiff in error, and did right to direct the verdict as it did. We find no error in this case, and the judgment of the court of common pleas is affirmed.

APPEAL AGAINST JOINT DEFENDANTS.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL JOHN C. LARWILL, v. HARRY L. VAIL,
CLERK OF THE COURTS.

Decided, December 3, 1900.

Appeal—When Appeal by One Party Operates as an Appeal as to All.

Where an appeal is perfected by several parties claiming funds in the hands of two joint defendants, and by one of the joint defendants, such appeal takes the case up in so far as any decree rendered against the other defendant in the lower court is concerned.

J. D. Critchfield, for plaintiff.

C. H. Kibler and Henderson & Quail, contra.

CALDWELL, J.; MARVIN, J., and HALE, J., concur.

This is an action in mandamus, brought by the plaintiff against the defendant in this court, asking for an order from this court directing the clerk to issue execution on the judgment obtained by John C. Larwill against Stevenson Burke in the court of common pleas of this county.

In that action John C. Larwill was plaintiff, and it was brought against Stevenson Burke and Charles H. Hickox, executor of the estate of Charles Hickox, deceased, and against Lee and Hull and others. The complaint in that action was, that Burke and Hickox had in their hands, as directors of the Cleveland & Snow Fork Coal Company, certain moneys that belonged to the company, and that the company was under the control of Burke and Hickox as directors of the Cleveland & Snow Fork

1916.]

Cuyahoga County.

Coal Company, and that a prosecution on the part of the company could not be had for the reason that the company was entirely under the control of Burke and Hickox. The relief asked was that the stockholders might recover from Burke and Hickox the money that was due them from the company by reason of their being stockholders in the same. Larwill claimed to be such a stockholder and was found to be such; so were Lee and Hull; and it was found that the allegations above referred to in the petition were true. A judgment was rendered in favor of Larwill for the amount of his claim as found by the common pleas court against Burke and Hickox, and a like judgment was obtained by Lee and Hull. There was a contest in that action between Larwill and Lee, and also a contest between Larwill and Hull. Larwill claimed to be the owner of the stock which formed the basis of the claim of Lee against Burke and Hickox, and that was denied by Lee.

The same was true as to the issue between Larwill and Hull. Those issues were determined severally in favor of Lee and Hull, and against Larwill. Hickox, as administrator, appealed. The corporation, the Cleveland & Snow Fork Coal Company, was a party to the action and it appealed. Larwill appealed as to the issues found against him, which issues were between himself and Lee, and himself and Hull.

The case was brought into the circuit court by these appeals, and has been tried by the circuit court. In that trial the circuit court held that the case was of such nature that it was appealable, and it is not necessary at this time to say anything more upon *that* proposition, and it is not sought to have the court reverse itself as to *that holding* in this action.

The questions to be considered here are, whether the appeal by Hickox, as administrator, and by the Cleveland & Snow Fork Coal Company, and by Larwill, one or all of them, brings up the case as to the issues against Judge Burke. The case is one against Burke and Hickox, as administrator, as joint obligors in such a manner that they are not separated in any manner by the pleadings or anything that was done in the case as to the other, unless it is the fact that Charles Hickox in his lifetime is

said to have become liable jointly with Judge Burke for this money to the stockholders of the company, but that by his death and the appointment of his administrator, the obligations became separated and several, and that being true, the appeal by the administrator would not bring the action up as to Judge Burke.

We are unable to agree with counsel, that the death of Hickox had any such effect as is claimed for it, and it is our opinion that the appeal of Hickox brought up the case as to Judge Burke as well as to himself.

Larwill appealed, in which appeal he seeks to have the judgment obtained against him by Lee, as well as the judgment obtained against him by Hull, reversed and a different holding made. If that appeal brings up only Lee and Hull, and Lee and Hull are unable to obtain a judgment against Judge Burke, then Larwill can get none unless Burke is in the circuit court, for setting aside the judgment of Lee and Hull by the appeal would leave money in the hands of Burke and Hickox unappropriated so far as can be done by any adjudication; and it is *that* money that is sought to be reached by Larwill. It appears to us that in order to reach the money that was to be paid by Judge Burke on the part of Larwill, that Judge Burke must be here as the custodian of the money, whether as trustee or in any other capacity.

Hence we conclude that the appeal of Larwill as against Lee and Hull brought up the subject-matter of their litigation, which was as to who was entitled to the money going to the person who should be held to hold the stock in litigation between them, and that the money can not be in the court without the persons who hold it are there; and that, therefore, that appeal brought up *all* persons connected with the case so far as any questions in *this* action are concerned.

The writ of mandamus is denied.

1916.]

Hamilton County.

PRIORITY AMONG MORTGAGES EXECUTED BY HEIRS.

Court of Appeals for Hamilton County.

AMELIA SCHELL V. MATHILDA BERNHARD ET AL.

Decided, July 19, 1915.

Mortgages—Acceptance of Mortgage from Heirs—In Satisfaction of Claim against Estate—Not a Waiver of Priority Over Previous Mortgages by the Heirs, When.

One who holds a claim against the estate of a decedent does not, by accepting a mortgage executed by the heirs, waive his priority over previous mortgages by the heirs, in so far as these mortgages to pay off general creditors of the estate, the subsequent mortgage containing a recital disavowing any intention to waive such priority.

George D. Harper and Black, Swing & Black, for Southern Ohio Loan & Trust Co.

Johnson & Levy, for Western & Southern Life Insurance Co.
Kramer & Bettman, for the Alms & Doepke Co.

JONES (E. H.), J.

This is an action for partition of real estate left to Karl Romer, deceased. Action was brought by the plaintiff, Amelia Schell, daughter of said Karl Romer, against the other surviving children, the Alms & Doepke Company, the Western & Southern Life Insurance Company, the Southern Ohio Savings Bank Company et al.

There is no controversy among the heirs as to their respective shares in the realty. The issues drawn by the pleadings and upon which the case was appealed to this court are between the mortgagees, the same being the Western & Southern Life Insurance Company, the Southern Ohio Savings Bank Company and the Alms & Doepke Company, all of whom hold mortgages upon the property which bear date subsequent to the death of said Karl Romer and were executed by his widow and children. At the time of the death of Karl Romer he owed a considerable sum of money to the Alms & Doepke Com-

pany. The two other mortgagees at that time held mortgages on the real estate herein partitioned. The subsequent mortgages to them were given to secure loans which embraced the sums due upon the former mortgages and also additional sums in each case procured by the heirs to pay off the indebtedness of the estate. It was fifteen months or more after the death of said Karl Romer, and some time after these mortgages were given, that the mortgage to the Alms & Doepke Company was executed and delivered by the widow and next of kin to secure the payment of the debt owing to said company by decedent.

The question we are called upon to decide is whether or not the Alms & Doepke Company, by accepting this mortgage, waived the priority of its claim against decedent's estate in favor of the other two mortgagees. No question is raised by the Alms & Doepke Company as to the priority of their mortgage in so far as they represent money advanced to take up and cancel mortgage loans existing at Karl Romer's death. But as to the additional loans represented by said two mortgages, advanced as aforesaid for the payment of general claims, it is claimed that the mortgage of the Alms & Doepke Company has priority.

We must be content in this decision to thus briefly state the issue that we are called upon to decide, and more briefly state the conclusion which we have reached.

The mortgage deed, given to the Alms & Doepke Company as aforesaid, in addition to the usual provisions contains the following recital:

"It being understood and agreed that the Alms & Doepke Co. by the acceptance of this mortgage does not admit the priority of said mortgages of the Southern Ohio Savings Bank Company and the Western & Southern Life Insurance Company, except in so far as the two mortgages were given to take up mortgages made by said Karl Romer in his lifetime."

And it also names the following consideration:

"In consideration of one dollar to them in hand paid by the Alms & Doepke Company, and in further consideration of the Alms & Doepke Company forbearing to proceed against said real estate of Karl Romer, deceased, to satisfy said claim,

1916.]

Auglaize County.

as hereinafter provided, and for other good and valuable considerations," etc.

The amount secured by this mortgage, to-wit, \$4,581.17, was made payable in three annual equal installments due in one, two and three years from date, respectively.

It is earnestly contended by the attorneys for the prior mortgagees that by extending the time of payment of its claim, and the acceptance of the mortgage and by forbearing to press its claim for collection, the Alms & Doepke Company has waived the priority which the law gives to its claim, and is estopped to assert such priority as against the two mortgages which are prior in point of time of execution and record.

We take it as elementary that there can be no waiver of a right unless same is expressed by word or in writing, or unless the acts and conduct of the party have been such that a waiver will be presumed. It is not claimed that there has been any express waiver on the part of the Alms & Doepke Company, but a great deal has been said in argument and by brief in support of the latter alternative, viz., that the waiver is to be presumed in this case by the acceptance of the mortgage and extension of time of payment, etc., provided therein.

Numerous cases are cited by counsel on both sides to show when and under what circumstances a waiver is or is not to be presumed. These cases have been examined, together with other authorities upon the subject, and we have yet to see a single case where a court has declined to discuss the presumption or non-presumption of a waiver, or the question of estoppel, where the instrument in question, or the language used, contained statements expressly disclaiming any intention to waive, as does this Alms & Doepke Company mortgage.

It might well be contended as between the parties to this mortgage. that the mortgagee has by its acceptance delayed its right to enforce its claim or lien. In fact, the language of the instrument, as above quoted, shows that the Alms & Doepke Company was to forbear in the enforcement of its claim. This only draws our attention to the distinction between the right of a lien, and the right of enforcement of a lien. The latter

question is not involved in this case. All of the lien holders were brought into this partition proceeding as defendants and have filed answers asking for the protection of their rights. The nature of the proceeding and the consequent partition of the property requires a satisfaction of these liens. The action was brought by one of the very persons in whose favor the Alms & Doepke Company agreed to forbear and neither she nor any of her co-mortgagors are complaining or interposing any objection to the priority claimed by the Alms & Doepke Company.

In conclusion we will only state that we can not see how these other mortgagees can be heard to complain or to claim any right or benefit to be derived by reason of a subsequent transaction about which they knew nothing, and to which they were not parties. The parties to the Alms & Doepke mortgage all expressly agreed that no right of the company should be deemed waived thereby. We find no authority that will enable the insurance company or the savings bank company to derive any benefit or occupy any better position by reason of this transaction. It must be conceded that it was not within the power of the parties to the Alms & Doepke mortgage to impair the rights of the other mortgagees. How, then, can it be maintained that the transaction could inure to their benefit? We are of the opinion that the purpose of the Alms & Doepke mortgage was to induce the company to forbear to proceed against the real estate. That agreement and that purpose in no way affected the rights of the other mortgagees. Any intention to waive was expressly disclaimed.

So far as the mortgages given to the savings bank company and the insurance company cover moneys not used for taking up decedent's mortgages, they are held to be inferior and subject to the Alms & Doepke mortgage.

1916.]

Guernsey County.

**ACTION AGAINST COUNTY COMMISSIONERS ON ACCOUNT OF
DEFECT IN HIGHWAY.**

Circuit Court of Guernsey County.

GUERNSEY COUNTY COMMISSIONERS V. SAMUEL BLACK.*

Decided, November 13, 1911.

Constitutional Law—Validity of Act Permitting Impanneling from Adjoining County in Action Against County Commissioners—Actual Notice of Defect in Highway—Not Necessary to Render County Commissioners Liable—Lack of Funds to Repair Defect in Highway a Matter of Defense—Not Negligence to Drive on Edge of Macadamized Road.

1. Section 11418-1, as amended (102 O. L., 41), permitting a jury to be drawn from an adjoining county in an action against the county commissioners, is a constitutional enactment and applies to a suit brought before its passage, there being no vested right in a remedy.
2. Actual notice of a defect in a highway is not necessary to establish liability against county commissioners in an action for injuries suffered because of such defect, if constructive notice of such defect is shown.
3. While lack of funds with which to repair a highway may be made a matter of defense in an action against the county commissioners for injuries, it is defensive matter only and the petition need not aver that funds were available for repair of the defect.
4. A person traveling along a highway is not chargeable with contributory negligence in permitting the wheels of one side of his vehicle to get just outside of the macadamized part of the road, where a hole existed into which the wheels dropped causing the accident complained of.

C. F. Sheppard, for plaintiff in error.

J. S. Black, contra.

METCALFE, J.

This action was brought to recover damages claimed to have been suffered by the defendant in error—plaintiff below—by

*Affirmed without opinion, *Guernsey County Commissioners v. Black*, 88 Ohio State, 587.

reason of a defect in the highway known as the National Road. Mr. Black recovered a judgment in the common pleas court, and error is here prosecuted. Several grounds of error are alleged:

First, it is claimed that there is no liability on the part of the commissioners, as shown by the petition; the verdict is against the weight of the evidence; that the law under which the jury was drawn, and the case tried, is unconstitutional, and that there is error in the charge of the court.

In the limited time that I have I can not discuss these questions to any great extent, but will only call the attention of counsel to the points that we think are decisive. Whether or not there was any liability on the part of the commissioners as shown by the facts stated in the petition, is a question that this court has passed upon once, and we do not feel at this time that we are called upon to reverse the decision that was made at that time, and that is all that we care to say upon that question. See *Black v. Guernsey County Commissioners*, 13 C.C.(N.S.), 252.

Is the law (General Code, 11418-1, amended 102 O. L., 41) under which the jury was drawn in this case unconstitutional? The law provides that where the county commissioners and some other officers which are named are parties to an action, a jury may be drawn from another county, and that was done in this case, the jury having been drawn from Muskingum county. We think, without entering upon a discussion of that question, that the Supreme Court has settled it in *Snell v. Railway*, 60 Ohio St., 256, in which the law authorizing a change of venue in cases where a corporation having more than fifty stockholders resident of the county is a party, settles that question. We think that case is decisive of the constitutionality of this law, and it is not necessary to discuss it more.

Counsel still say, however, that in the event the law is constitutional, it should not apply here because it was passed after this case was commenced; that they have a vested right in the remedy which was in force at the time—that is, which was provided for by the statute at the time the action was commenced. Impanneling a jury is part of the procedure by which the machinery of justice moves. It relates only to the method by which the remedy is administered. By changing it the right of a party

to sue or defend is not affected. His substantial rights are not changed. We think a party can not acquire a vested right in a remedy, or any part of it. *Lawrence Ry. v. Mahoning County Commissioners*, 35 Ohio St., 1; *Templeton v. Kraner*, 24 Ohio St., 554, 563; *Rairden v. Holden*, 15 Ohio St., 207, 211.

It is claimed also that the court erred in its refusal to charge a request which was offered on the part of the defendant, in which—without stopping to read it all—the court is asked to charge the jury that if they found that there was a defect in the highway, and that that was the proximate cause of the accident, still they would not be liable unless the jury also found that the commissioners had actual notice of the defect. We do not think that states the law. An actual notice was not absolutely necessary. The facts and circumstances might be of such a character that the commissioners might be required to take notice, although they did not have actual notice. I observe, however, in going through the charge that this request is substantially given in the charge, so that there would be no error in failing to give it, anyway.

Again, it is urged that there must have been an allegation in the petition in this case that the commissioners had funds in the treasury, and at their disposal, with which to make repairs upon this road. We do not have any doubt, after having consulted the authorities upon that question, that the fact that the commissioners had no funds with which to make repairs upon the road, or had no means of procuring funds, is a defense to a cause of action arising out of an accident for failure to repair a country road. But when the plaintiff states his cause of action must he allege that the commissioners, or the proper officers, have provided and have under their control sufficient funds to meet the necessary repairs, or is it a defense? In our judgment it is a defense, and must be plead and proved by the commissioners. And upon this question we call the attention of counsel, as sustaining that proposition, to *Hover v. Barkhoof*, 44 N. Y., 113, 118, in an action similar to this. The same doctrine is also held in *Hines v. Lockport*, 50 N. Y., 236, and counsel will find a collection of the authorities in 15 Am. & Eng. Enc. Law (2d Ed.), 412, upon that question.

The question in this case which bothers us the most, and which we had given the most consideration, is whether or not upon the evidence in this case the plaintiff is entitled to recover. It appears that Mr. Black was driving upon the highway, and driving a horse that was somewhat restive, and he met an automobile. He raised his hand to the driver of the automobile to stop, and he did stop upon the north side of the highway. Something like 200 feet beyond where the automobile stopped, and in the direction which Mr. Black was going, there was this defect in the highway; and it is shown that there was a substantial defect there; where the culvert had crossed the highway, and outside of the traveled part of the highway, but in the graded part, it had fallen down, and there was a hole. He drove on; and when he passed the automobile he passed upon the south side of the road, but afterwards drove upon the north side. He says his horse was under control at the time. He passed along upon the north side of the road, either his horse very close to the side of the macadam—perhaps in the wheel track, or his right wheel in the wheel track—at any rate, very close to it, when the left wheel of the buggy went into this culvert, and he was pitched out and received some injuries.

Now, in a case of this kind it is urged that the rule that where a party departs from the known safe path, and takes another path, and is injured, that he must stand the consequences of his injuries. But where you are upon a traveled road what is the safe path? Is it simply a path—a roadway eight or ten or fifteen feet wide, as the case may be, upon which are the wagon tracks, or wheel tracks, that are made by continuous travel; and if you get a foot or a foot and a half outside of that are you guilty of contributory negligence? And that is the question here.

Now, this man, Mr. Black, was very close, evidently—very close to the traveled part of the highway, and the wheels upon one side of his buggy were only off from it when he went into this hole. Under such circumstances we do not feel we can say he was guilty of contributory negligence; and under the evidence and the law of the case we are inclined to think that the judgment should be affirmed, and that is the judgment of this court.

POLLOCK, J., and NORRIS, J., concur.

1916.]

Huron County.

**PRESUMPTION OF LEGALITY OF PAYMENTS BY MUNICIPALITY
FOR NECESSARY SERVICES.**

Court of Appeals for Huron County.

CITY OF NORWALK v. R. L. CHRISTIAN.

Decided, April 15, 1916.

Municipal Corporations—Payments to City Clerk for Serving Notices of Improvements—Bills of Exceptions—Failure to Use Language Showing That all the Evidence is Incorporated Therein—Careless Use of the Word "Testimony" in the Place of "Evidence."

In the absence of any allegation of fraud or collusion, a presumption arises that payments made by a municipality for services were regular and duly authorized, and where the payments were such as the city should have made and the persons receiving them were fairly entitled to what they received, an action can not be maintained by the city for recovery back of the amounts so paid, on the bare allegation that no ordinance "appears" to have authorized such payments.

Edward C. Turner, Attorney-General, R. D. Wickham and Charles Follett, for plaintiff in error.

L. W. Wickham, contra.

KINKADE, J.

The city brought an action in the justice court to recover the sum of \$70, being the amount of certain fees paid by the city to the clerk of the council for serving improvement notices. The petition is based upon a report filed by the bureau of inspection and supervision of public offices, with the state auditor. It sets forth the portion of the report so filed showing amounts due that aggregate the amount claimed in the petition. In this report set out in the petition is found the statement that "The records of the council do not show that council ever fixed any compensation for serving notices, and in the absence of an ordinance or resolution passed by the council under Section 4214, G. C., fixing the compensation, the mere fact that appropriations have been made does not comply with the requirements of the

law as provided by said section.” A demurrer was filed to this petition, which was overruled, after which an answer was filed by the defendant, admitting that the plaintiff is a municipal corporation, and that the defendant during the time covered in the petition was the duly elected, qualified and acting clerk of the city of Norwalk, and denying all other allegations. On the trial of the case, over objection of counsel for the defendant, the report of the bureau of accounts was offered in evidence, and thereupon the auditor of the city was called and examined as a witness, whereupon the plaintiff rested its case. On motion of the defendant the court directed the jury to return a verdict in favor of the defendant. This action of the court is assigned as error. The case has been very fully presented on both sides by briefs.

We find no statement in the bill of exceptions that the bill contains all the evidence. The statement at the beginning of the bill is as follows: “The plaintiff to maintain the issues on its part to be maintained called the following witness and offered the following testimony, all of which is hereinafter fully set out.” It will be observed that this statement only goes to the length of stating that the bill contains the testimony that the bill contains. It does not say that it contains all the testimony that was offered at the trial. It would have been quite evident without a statement at all, that the bill contains what it does contain, and that is all that is said by the statement quoted. It has been several times held by this court that the use of the word “testimony” in this connection is not sufficient. The word “testimony” has reference to the oral testimony of witnesses on the stand. The word “evidence” is of much broader significance and includes the testimony of witnesses and all other evidence in whatever form offered in the case. This statement in the bill would be quite insufficient if it said that it contained all the testimony, which it does not. It is more insufficient in failing to state, as it does, that it contains all the evidence. This being the state of the record, we might content ourselves with affirming the judgment on the authority of *Regan v. McHugh*, 78 Ohio St., 326, which squarely holds that a reviewing court can not reverse a

1916.]

Huron County.

judgment entered upon a verdict directed by the trial court, unless there is brought to the reviewing court all the evidence upon which such directed verdict was returned and judgment entered. Manifestly this decision was based upon the fact that every presumption of regularity and validity attends the judgment of the trial court and the burden is carried by the plaintiff in error to show that the judgment is erroneous. If there may have been before the trial court such evidence as entirely justified the court in directing a verdict for the defendant, the reviewing court must presume, in the absence of a bill containing all the evidence, that such evidence was before the trial court.

We think, however, it is not necessary to rest the decision in this case upon the ground mentioned, alone. This was an action on the part of the city to recover money that had been paid to the clerk of the council for the serving of notices and the payments were made by the city treasurer upon warrants issued by the city auditor. It is said that the petition makes a *prima facie* showing that the council had not, prior to the time of the payment, passed an ordinance or adopted a resolution fixing the compensation to be paid to the clerk of the council for the serving of the notices in question, and that consequently the payment of compensation for the service mentioned was unauthorized by law. It is not stated in the petition, nor claimed in the brief, that the service was not performed, or that the amounts paid therefor were unreasonable, or that any fraud or bad faith was indulged in either by the auditor in issuing the warrant, or the treasurer in paying the same, or the clerk of the council in receiving the money upon the warrant. The sum total of the claim on the part of the plaintiff, even giving the language used the fullest scope that can be claimed for it, is that the council had not, prior to the time of the payment, fixed by either ordinance or resolution the compensation to be paid. The fact is that the report of the bureau of supervision does not quite state this, but only states that the record fails to show any ordinance or resolution fixing the compensation; but, even conceding the language to have the scope that I have mentioned, the petition falls very far short of stating as a fact, even when

aided by the provisions of Section 286-1, G. C., that the council did not in fact authorize the payment of this amount to the clerk of the council prior to the drawing of the warrant by the auditor and the making of the payment by the treasurer pursuant to the warrant. The fact of the performance of the service and the payment being admitted, and there being no charge of bad faith or fraud, the situation is at once attended by the presumption that the public officials, the auditor and the treasurer, discharged their duties in a legal way and paid out the money of the city only after having received authority of the council so to do. It is not claimed by counsel for plaintiff that the city might not have legally paid the amounts in question to the clerk of the council for the service performed, had the city seen fit to fix in advance the amount of this compensation by ordinance or resolution of the council. We think the case falls squarely within the decision of the Supreme Court in *State v. Fronizer*, 77 Ohio St., 7.

The record clearly shows that the city has paid nothing but what it should have paid, and the defendant has received nothing but that which he was entitled to receive from the city, and, therefore, the verdict and judgment of the court of common pleas accomplished substantial justice and the judgment will be affirmed.

RICHARDS, J., and CHITTENDEN, J., concur.

**AS TO LIABILITY FOR INJURIES SUSTAINED BY A
VOLUNTEER.**

Circuit Court of Lucas County.

GENERAL RAILWAY SIGNAL CO. v. E. VALOIS, ADMINISTRATOR OF
THE ESTATE OF VINCENT TODA.

Decided, June 12, 1909.

*Volunteer—Measure of Duty as to Safety—Owing to a Volunteer by
One Calling for His Assistance—Assumption of Risk—Negligence of
the Master or of His Servants—No Contract Relation—Motive of
Volunteer—Must Take the Situation as He Finds it—Ordinary Care
in Furnishing Appliances Which Are Reasonably Safe—Charge of
Court.*

One who calls for and procures the gratuitous assistance of a volunteer does not owe him the duty of exercising ordinary care in the furnishing of proper tools or a safe place to work; but where the volunteer is serving a purpose of his own or of his master in complying with the request for help, he is entitled to the exercise of ordinary care on the part of the one calling him or his servants.

Smith & Baker, for plaintiff in error.

Stephen Brophy, contra.

KINKADE, J.

In this case, in which there was a judgment for the plaintiff in the court of common pleas, the plaintiff in error assigned for consideration a large number of errors, and passing for the present the errors assigned with reference to the admitting of testimony, we take up the errors to which our attention is called in the request to charge, given before argument, and in the general charge of the court. And I may say at this time that this is a case to which we have given a great deal of attention. We were cited to the case, by the defendant in error, of *Railway Company v. Marsh*, a decision of our own Supreme Court, 63 O. S., page 236, and it may be said that the record in the case at bar justifies the most careful study of the case of *Railway*

Company v. Marsh. There are many cases similar to this from other states that we have also examined in connection with our careful reading of the Marsh case. Taking up the errors as I have mentioned in the request to charge, plaintiff asked and had given before argument requests Nos. 3, 1, 6 and 2, and exception was taken to the giving of 3, 1, 6 and 4, as appears by the bill of exceptions, which leaves No. 2 as unexcepted to although it was argued here as incorrect; and it is finally stated on the records that the defendant excepts to 3, 1, 6 and 4 instead of 3, 1, 6 and 2. It seems that throughout this case the court treated the case as if the railway signal company owed to Vincent Toda every duty that it owed one of its employees, and even more in one sense, for the court held, and the Marsh case justifies the holding, that the railway signal company could not escape liability if the negligence from which the injury arose was the negligence of one of its employees, who would have been a fellow-servant had Toda been in its employ. But aside from this, the court states the law as fully as it could be stated if Toda had been in the signal company's employ, in this No. 3, which reads as follows:

“3. If the jury finds from the evidence that the decedent, Vincent Toda, was in the employ of the Toledo Railways & Light Company upon April 10, 1907, and was directed by said company or its agents in charge of said Toda to assist in preparing and placing concrete at the base of a pole which the defendant had undertaken to erect for said Railways & Light Company, and should you further find that there was a foreman of the General Railway Signal Co., the defendant herein, in charge of and carrying on said work for the defendant, and that said foreman had authority to employ servants, and said foreman requested said Toda to assist in raising said pole, and if such assistance was apparently necessary, or if there was an actual necessity for him to assist in raising said pole, and if you further find that in response to said request said Toda did assist in so doing, and was thereby furthering or expediting the work of the Toledo Railways & Light Company, and in so assisting was injured by the carelessness or negligence of the foreman of the General Railway Signal Co., or any of defendant's servants engaged in raising said pole, which proximately caused his death, then you are instructed that the said Toda did not assume the risk of any negligence on the part of the servants of the defendant company, if

1916.]

Lucas County.

there was negligence, and did not assume the risk of said work being done with appliances that were not suited to doing said work, should you find that said appliances were not suitable to carrying on said work, unless decedent Toda knew that said appliances were not suitable to carrying on said work, or knew of the negligence of the foreman and servants of the defendant.”

We think this request as given is faulty in this regard, that it does not state, in addition to stating that Toda did not know, that Toda would not have known of the existence of these things by the exercise of ordinary care, and we think it is further faulty in this regard, that it charges the employer with the duty of seeing and knowing that the appliances with which Toda was invited to work were in an ordinarily safe condition for him to work with. It charges him with that duty, and we think he does not hold that duty, and that in that regard the charge is defective.

Request No. 1 (which follows) reads very much as the other request and I will not repeat it down to a given point, taking it up where he says that:

“If there was an actual necessity for him to assist in raising said pole, and if you further find that in response to said request, said Toda did assist in so doing and was thereby furthering and expediting the work of said Railways & Light Company, and in so assisting was injured by the carelessness or negligence of the foreman of General Railway Signal Company or any of defendant’s servants engaged in raising said pole, which proximately caused his death without fault on his part, and that decedent did not assume the risk, then you are instructed that the defendant is liable in this action for any and all pecuniary damages which you find the decedent’s wife and children have suffered by reason of his death.”

We think this request is faulty in this regard, that it makes the railway signal company liable if there was any negligence, regardless of its degree, on the part of those assisting the foreman. The language is, “Was injured by the carelessness or negligence of the foreman of the General Railway Signal Company or any of defendant’s servants engaged in raising said

pole.” This request would cover as it stands the slightest negligence. The parties might be exercising ordinary care in the fullest extent that the situation demanded and still be liable because they were guilty of some slight negligence.

My attention is called to a fact by Judge Wildman that had escaped me for the moment, that this is a request given before argument, and up to this time the court had not defined ordinary care or negligence. And this request we think is faulty in another regard, in that it submits to the jury the question of whether Toda did or did not assume the risk. If the facts are admitted, it is a question of law whether he assumed the risk, and if the facts are not admitted, it is for the jury to find the facts under proper instructions from the court. It is not for the jury to determine whether he did or did not assume the risk.

We think that request No. 6, that was excepted to, might be in better form than it is, but we are not disposed to hold that request No. 6 constitutes prejudicial error in this case.

Passing now to the general charge, there was an exception to the language used by the court on page 93, as follows:

“If the deceased, Toda, sustained the injuries which later caused his death by reason of the failure of the defendant, General Railway Signal Company, to exercise ordinary care in the furnishing of machinery or appliances for the erection of the pole, or if its servants failed to exercise ordinary care in the operation of raising the pole at the time Toda was hurt, and he himself was exercising ordinary care upon his part to avoid injury at the time that he was injured, the plaintiff, the administrator of Toda, is entitled to recover in this action.”

This presents perhaps clearer than any other portion of the charge, the question as to the right of a volunteer, who is not, strictly speaking, a volunteer, because he has some purpose of his own to serve, as mentioned in the Marsh case, to have the master exercise ordinary care to furnish him a reasonably safe place to work and reasonably safe appliances with which to work, and holds the master liable whether he knows the appliances are defective or not, in case they turn out to be defective. We think this portion of the charge is erroneous in this regard. We think a correct statement of the rule might be as follows:

1916.]

Lucas County.

“One who calls for and procures the services of a volunteer, gratuitously, does not owe him the duty to exercise ordinary care in furnishing a reasonably safe place or safe tools. * * * The duty in this respect is not the same as that of an employer to a servant. The volunteer is under no obligation to render the services solicited; he has no contract relation at all with the party who calls him, and he may serve or not serve as he pleases. In case a volunteer is serving a purpose of his own or his master in complying with the requests, then he is entitled to the exercise of ordinary care on the part of the party calling him, and also on the part of the servants of the party calling him, in anything they may do in connection with the voluntary service.”

We have examined a great many cases on this subject. It has given us no little concern, and we have been aided very materially by the briefs that have been furnished by the counsel in this case. The brief of counsel for defendapt in error is especially helpful in the examination of this case, and after examining a very large number of authorities we are satisfied that a volunteer, even though having some purpose of his own to serve, as the boy lighting the lamp had in the Marsh case, receiving pay from the agent, still he must take the situation as it is, as he finds it. We see no reason why a man may not ask a volunteer to aid him in something that is in itself unquestionably hazardous, and it may be that in aiding him the volunteer is serving some purpose of his own, and it certainly can not be the law that the moment the volunteer steps to the aid of the man who calls him, a duty springs into being to make the situation which is obviously surrounded by danger reasonably safe for the volunteer to act in. A man may be called by another to aid him, if he sees fit, in stopping a runaway horse, as dangerous an occupation as he could be engaged in, probably, and the man who aids him may have some purpose of his own in aiding him, but because he volunteers it is not the law that the man who asks him must immediately put the thing in a safe position for the volunteer to act, because it may not be possible to do so. It is very dangerous throughout, and bound to be dangerous, and the volunteer must assume it to that extent. It is a peculiar doctrine that a volunteer can hold liable one whose servant asks him to come, merely because he is

receiving some pay for coming from some servant of the man who called him, without the knowledge of the real employer himself, but that is the holding in the Marsh case, and it is very clearly stated, and, as I have said before, we have considered this Marsh case with great care.

The next point in the charge to which exception is taken is found on page 94, and we think this is one of the serious things in this case. The language is:

“It was the duty of the Railway Signal Co., in the first instance, to adopt and furnish such machinery and appliances for the erection of the poles as would be reasonably safe for the carrying on of the work. They are not guarantors of the safety of Toda, and were not required to furnish the latest or most improved appliances for the purpose, but were required to furnish such appliances as an ordinarily prudent person would customarily employ in a like enterprise. It was also the duty of the company, after having adopted such appliances, if you find that it did so, to so use the appliances adopted by it through its servants and employees as to make reasonably safe the performance of the work of erecting the pole by those engaged therein, and not to expose them to any greater danger while engaged in the work than the nature of the work itself would ordinarily involve, and which was necessarily incident to the performance of such work in an ordinarily prudent manner.”

The first thing that we note is wrong with this language is that it is squarely at variance with a very recent decision of the Supreme Court, to the effect that the duty of a master is not to make the place reasonably safe for the servants, or to furnish appliances that are reasonably safe for his use, but it is to exercise ordinary care to make the place reasonably safe and to furnish appliances reasonably safe. That is the duty relative to employees, and we can not see why the duty should be any higher relative to a volunteer, who may or may not come as he sees fit. We think this portion of the charge is clearly erroneous. And on account of the errors in the charge to which we have called attention, we think this case must be reversed.

One request was tendered by the defendant in error that the court under the testimony should instruct the jury to return a

1916.]

Lucas County.

verdict for the defendant. After a full consideration of all of the cases, we are inclined to say that were it not for the case of *Railway Company v. Marsh*, we would be disposed to hold that it would have been the duty of the court to have so directed, but of course the court could not direct under the evidence in this case with the Marsh decision standing as it does.

This brings us now to the errors that our attention has been called to relative to the admission of evidence, and they relate to evidence concerning the number of men necessary to erect the pole, and what was proper to be done, and expert evidence on this subject, etc. There was a general objection put in, with the consent of the court, to all this class of evidence, and an exception taken to its admission. The plaintiff in the action below sought to prove that the method by which this work was done was not correct, and to prove by expert testimony that it was not correct, and to prove that the number of men were not sufficient. We agree with the contention in the argument here of counsel for plaintiff in error that the number of men employed in this situation seems to have had nothing to do with the case at all. There were men enough employed to raise the pole; otherwise it never could have been raised. After the pole was raised a prop was placed under it, any one who reads this record will at once discover that the cause of the accident here was the improper placing of the prop by one, perhaps, who would have been a fellow-servant of Toda had Toda been in the employ of the railway signal company. But the difficulty is that Toda was not in the employ of the railway signal company. We will say this concerning all of this evidence that was admitted touching this feature of the case, that it is our opinion that this class of evidence should have been excluded. For the errors that I have mentioned the judgment of the court of common pleas will have to be reversed.

MR. BROPHY: Is there an assumption of risk in this case?

KINKADE, J.: We will answer that this way, that the volunteer, Toda, did not assume the risk of the negligence of the man who called him or his assistants or his employees, the active neg-

ligence of the men. We think he did assume the risk that is incident to the appliances with which he worked. We think the Marsh case protects him against the negligence of the man calling him and against the negligence of the servants of the man calling him in their active participation in the work to assist in the doing of which he was called.

WILDMAN, J.:

He did not assume the risk in the sense that a person assumes it by a contract of employment between master and servant, but assumed it something in the same sense that a person walking over a defective sidewalk assumes the risk, if he knows the danger or ought to see it or ought to know it by the exercise of ordinary care. It does not grow out of contract.

PROSECUTION FOR FORGERY OF A CHECK.

Court of Appeals for Licking County.

BURT COCHRAN V. STATE OF OHIO.

Decided, October Term, 1915.

Criminal Law—Failure to Produce Forged Instrument at Trial of the One Accused of the Forgery—Must be Satisfactorily Explained—Confession by the Defendant Must be Shown to Relate to the Particular Offense Charged.

1. In a prosecution for forgery, in which a denial has been entered, the defendant is entitled to have the alleged forged instrument produced or its non-production satisfactorily accounted for before secondary evidence as to its contents is admissible, and a mere statement by the prosecuting attorney to the effect that he did not have nor had he seen the instrument to which the indictment refers, either before or since the sitting of the grand jury which returned the indictment is not a sufficient explanation of the reason for its non-production at the trial.
2. Statements made by the defendant in the nature of a confession are insufficient upon which to base a conviction of forgery, where it

1916.]

Licking County.

does not appear that the so-called confession was an admission of the forgery by the defendant to the particular instrument upon which the indictment is based.

James F. Lingafelter, for plaintiff in error.

J. W. Horner, Prosecuting Attorney, contra.

SHIELDS, J.

Error was prosecuted herein to reverse the judgment of the Court of Common Pleas of Licking County.

One of the errors complained of is that the state, having conceded the loss of the alleged forged check before the sitting of the grand jury finding the indictment herein and before the trial of the plaintiff in error upon said indictment, failed to allege that said check was lost or destroyed and that upon said trial no *proper* proof was given of its loss or destruction to authorize the state to introduce the contents thereof.

Under an examination of the bill of exceptions we are of the opinion that no such proper proof was introduced of the loss or destruction of the alleged forged check as to admit of proof of its contents. True, the prosecuting attorney said in answer to an inquiry made by the court that he did not have nor had he seen said check before or since the sitting of said grand jury. This was simply a statement made by the prosecuting attorney.

Courts have uniformly held that on the trial of a person for a forgery the instrument alleged to have been forged must be produced on the trial or its non-production must be satisfactorily accounted for before secondary evidence of its contents is admissible. Here the forgery was denied by the plaintiff in error when on the witness stand; and in a criminal case involving the liberty of a person we think it is not too much to say that the accused is entitled to have the forged instrument produced, or its non-production properly and legally explained.

In this connection it might be stated that while the record shows that the plaintiff in error made statements after his arrest in the nature of confessions, still it does not satisfactorily appear that such alleged confessions related to this identical check, nor

does it appear that any diligence was used in searching for and producing said check. It may be that the witness, Parlet, had in mind, and possibly did have the check in question at the time of his conversation with the plaintiff in error, but the answers to the inquiries made by him of the plaintiff in error do not contain an admission of the signing of Parlet's signature to *this* check. Under this state of the record we think the court below erred in overruling the objection of the plaintiff in error in permitting secondary evidence of the contents of said check to be given to the jury and also in overruling the motion of the plaintiff in error to withdraw said evidence from the jury after given.

As to the action of the court below in overruling the motion of the defendant below to quash said indictment, and in overruling said demurrer to said indictment, we find no error in the action of said court, but for the error hereinbefore referred to this cause will be reversed and said cause remanded for further proceedings.

POWELL, J., and HOUCK, J., concur.

1916]

Ashland County.

FAILURE TO ACT UPON SEEING POSSIBLE DANGER.

Court of Appeals for Ashland County.

THE BALTIMORE & OHIO RAILROAD COMPANY V. GEORGE E. KOONS,
AS ADMINISTRATOR OF THE ESTATE OF WILL A. KOONS,
DECEASED.*

Decided, January Term, 1914.

Negligence—Question of, by the Driver of a Team at a Railway Crossing—Special Finding by Jury Held Not Inconsistent with General Verdict.

A special finding by the jury that the decedent could have seen as far as a point named by them in the direction from which the locomotive which struck and killed him was approaching, is not equivalent to a finding of contributory negligence or inconsistent with a general verdict in favor of the administrator, inasmuch as he may have looked but been misled as to the speed of the locomotive or the absence of danger signals upon which he had a right to rely and thus been led to believe he could cross the track in safety.

Arrel, Wilson, Harrington & DeFord and C. P. Winbigler, for plaintiff in error.

E. M. Palmer and L. J. Myers, contra.

SHIELDS, J.

In this proceeding a reversal is sought of the judgment rendered by the Court of Common Pleas of Ashland County, Ohio, upon a verdict for the defendant in error in an action for damages for personal injuries alleged to have been sustained by one Will A. Koons at a public highway crossing in the village of Sullivan in said county, which said injuries so received by him resulted in his death, and which were caused by the alleged neglect of the plaintiff in error.

In his second amended petition in the court below, it was alleged by the plaintiff that on the 23d day of January, 1908.

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 2, 1914.

the defendant company maintained three tracks that crossed a public highway in said village, one of which was used as a main line, one a side-track and the other a spur track, all passing over said highway east and west, and which highway was a much traveled thoroughfare running north and south through said village, that on said date the defendant company maintained a depot building located a few rods east of said crossing, and a water tank and watering station east of and close to said depot; that on said date the said Will A. Koons was driving with a team of horses and wagon along said public highway approaching said crossing from the north; that at the point where said highway crossed said tracks the view to the east side of said highway was obstructed by box cars standing on said spur track, and by other obstructions on defendant's right-of-way on the north side of said tracks, east of said crossing, all of which was well known to the defendant; that at the time said Koons approached said crossing the weather was dark and cloudy, the wind was blowing hard from the northwest and snow was falling in large quantities and blown in gusts by the wind, all of which tended to obstruct his view as he approached said crossing; that as he drove toward and upon said crossing not knowing of the approach of any train, the defendant ran one of its locomotives with a car attached thereto upon and over said main track at a very high and dangerous rate of speed, omitting to give any signals by bell or whistle or otherwise of the approach of said locomotive and car over said crossing, and failed to maintain a headlight on said locomotive or other light or signal to indicate its approach, and as the said Koons drove on to said crossing, without fault or neglect on his part, the defendant carelessly and negligently ran said locomotive against him and his wagon and violently struck and killed him and demolished his wagon; that the defendant failed to take any precautions whatever for the safety of said Koons and might have avoided striking and killing him by the exercise of ordinary care. Damages in the sum of \$10,000 were prayed for.

In its answer the defendant set up two defenses, one being in effect a general denial of the negligence charged, and the

1916.]

Ashland County.

other being a charge of contributory negligence upon the part of said Koons.

The plaintiff's reply contained a general denial of the contributory negligence charged.

A verdict of eight hundred dollars was awarded the plaintiff, and by a petition in error filed the case is brought before us for review.

Said petition in error contains numerous assignments of error, but the plaintiff in error specially urges upon the attention of this court what is designated therein as the ninth assignment of error, namely:

"That the general verdict returned by the jury is clearly inconsistent with the special findings of the jury and contrary to the clear weight of the evidence and the law of the case."

It appears that said cause was tried at a former term of said common pleas court and the judgment of said court was reversed by the circuit court and on being taken to the Supreme Court on error it was by said court remanded for a new trial, which resulted as hereinbefore indicated. Upon the hearing in this court it was stated by counsel for the plaintiff in error that the evidence upon the last trial was substantially the same as upon the first trial, hence the finding made by the circuit court renders it unnecessary to consider the errors assigned here at any length, except as to the legal effect of the special finding of the jury.

At the close of the testimony of the plaintiff below a motion was made that the trial judge instruct the jury to return a verdict for the defendant below which was overruled, and said motion was renewed at the close of all the testimony in the case which was likewise overruled, and in overruling said motions it is contended that said court erred. Under the evidence contained in the bill of exceptions, we are of the opinion that the action of the court below in this respect was proper and furnishes no ground of reversible error.

At the request of the defendant below, said court submitted to the jury for answer two interrogatories, to be answered and

returned as answered, with the general verdict. Such interrogatories and answers were as follows:

First. "For what distance could Koons have seen engine 2626 approaching the crossing from the east if he had exercised ordinary care in looking in that direction as he drove from the spur track on to the side track?" Answer. "About to the car house."

Second. "Was the crossing signal by a whistle given as the train approached the car house from the east?" Answer. "We think not."

The defendant below moved said court for a judgment in its favor on the special verdict and finding of the jury, notwithstanding the general verdict, which was overruled, and judgment was entered on the general verdict returned by the jury. The plaintiff in error contends that by this special finding of the jury the said Koons was guilty of contributory negligence and that the defendant in error was thereby precluded from a recovery in this action. In other words, that this finding of the jury was irreconcilably inconsistent with its general verdict, and that therefore the latter can not stand but must give way to this special finding.

Section 11463, General Code, provides:

"When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk."

Section 11464, General Code, provides:

"When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly."

In *Davis v. Turner*, 69 O. S., 101, it is held:

"To be inconsistent with the general verdict as contemplated by Section 5202, R. S., it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify the court in setting aside or disregarding the general

1916.]

Ashland County.

verdict on the ground that it is inconsistent with such special findings, the conflict must be clear and irreconcilable.”

While we have read the bill of exceptions in this case we do not feel called upon to enter upon a lengthy discussion of the evidence contained therein in passing upon the question made, namely, the legal effect of this special finding of the jury as bearing upon the question of the alleged contributory negligence of the deceased.

Is the answer to the first interrogatory clearly and irreconcilably in conflict with the general verdict? We think it is not. In *C., C. & C. R. R. Co. v. Crawford*, 24 O. S., 631, it is held that:

“Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed. But the omission to use such precautions, by a person injured, will not defeat his action, if, by due diligence in their use, the consequence of the defendant’s negligence would not have been avoided. Nor will the failure to use such precautions be regarded as negligence on the part of the plaintiff, if, under all the circumstances of the case, a person of ordinary care and prudence would be justified in omitting to use them.”

In commenting upon the foregoing decision the judge announcing the opinion in the case of *Traction Company v. Brandon*, 87 O. S., 194, says:

“The effect of the entire holding is that the omission to look is not negligence in all cases *and as matter of law*, and it remains the law of Ohio today, though there are a number of decisions of courts of other states, notably Massachusetts, which appear to hold a more rigid rule. It is the Ohio rule respecting the crossing of a steam road, and, for a much stronger reason, the rule as to crossing a street railway track.”

Did the deceased look to see if a train was approaching before attempting to go upon and over this crossing? The testi-

mony of several witnesses tends to show that he did, that is, he looked to the east and in the direction that the train was approaching before going upon the main track. True he may not have been able to see for any considerable distance east of the crossing before reaching the main track on account of the box cars standing on the spur track as claimed, but that he was looking east as he drove upon the main track is evident. The jury found that he so looked and could see the train approaching as far east from the crossing as the car house, and it is argued that this finding shows such contributory negligence upon his part as to defeat the right of his administrator to recover. But does the answer to said interrogatory clearly and unmistakably show that he was guilty of contributory negligence? While the answer shows that the deceased could see for the distance mentioned, it does not state or even imply that he did not look. Aside from the testimony referred to in this respect, he may have looked and listened before attempting to pass over the crossing, and the presumption is that he did.

In the case of *Interurban Railway & Terminal Co. v. John M. Hines, Admr.*, 13 C.C.(N.S.), 168-170, which was a case involving the alleged running of a street car at a street crossing resulting in the death of decedent, it was held that:

“As to whether or not the decedent stopped, looked and listened before attempting to cross the track of the railway company, we are not prepared to say that she did, and she at least had the right to assume that the plaintiff company in the handling of its cars would exercise ordinary care towards her at this particular time and place under all circumstances. But if the evidence would not show such an inference and was wholly lacking upon this point, there is the legal presumption in her favor that she did look and listen.” Citing *B. & P. R. R. Co. v. Landrigan Co.*, 191 U. S., 461. The same holding was made in 95 U. S., 161; 163 U. S., 353.

He may also have been misled by not hearing any signals or warnings given of the approach of the locomotive which he had a right to anticipate would be given, and supposing and believing that he could cross the track in safety attempted to so

1916.]

Ashland County.

cross and was injured. Under such circumstances, could it be claimed that he was guilty of such contributory negligence as would defeat an action to recover? Under the holding in *Schweinfurth's Admr. v. R. R. Co.*, 60 O. S., 215, we think he ought not be deprived of such right. Whatever the conduct of the deceased may have been, was it not a question for the jury to determine what a reasonably prudent man would and should have done under like circumstances? At best it was a question on which different minds might honestly differ, and it was therefore for the jury to determine whether or not he was guilty of contributory negligence. *Railway v. Murphy*, 55 O. S., 135; *Snell v. R. R. Co.*, 54 O. S., 197; *Traction Co. v. Brandon*, 87 U. S., 187.

The finding by the jury was not one of contributory negligence but that the deceased could have seen east of the crossing for a distance as far as the car house. This was a finding of fact—one growing out of a logical rather than a legal deduction from facts. Negligence and contributory negligence are mixed questions of law and fact to be determined by the jury, under proper instructions, so in this case we think that the effect of the special finding of the jury was one of both law and fact, not of law only, and that such finding is not conclusive of the right of the administrator to recover herein. The contention of the plaintiff in error in this respect therefore is not sustained.

It is also urged that the verdict of the jury is clearly against the weight of the evidence and contrary to law. An examination of the bill of exceptions shows no little conflict of evidence given by the respective parties hereto on matters material to the several issues involved, but aside from the former judgment of the circuit court in this respect, the judgment of this court is that the verdict of the jury is sustained by the evidence and that the same is not manifestly against the weight of the evidence or contrary to law.

We have also examined the bill of exceptions with reference to the other errors assigned in said petition in error and we find no such errors in the record as require a reversal of the judgment of the court below.

The judgment of the court of common pleas will therefore be affirmed, with costs. Exceptions.

VOORHEES, J., and POWELL, J., concur.

PROSECUTION FOR KEEPING SALOON OPEN ON SUNDAY.

Court of Appeals for Hamilton County.

HENRY KREIMER V. STATE OF OHIO.

Decided, December 6, 1915.

Criminal Law—Jurisdiction in a Prosecution for Keeping Saloon Open on Sunday—Not Lost by Failure to Determine Whether it Was the First Offense, When—Section 13050.

Failure of the record to show, in a prosecution for keeping open on Sunday a place in which intoxicating liquors are sold on other days of the week, that the offense charged was the defendant's first offense, does not require a reversal of the judgment of conviction, where the affidavit and judgment show it was his first offense, and there is no transcript of the evidence to show that anything to the contrary appeared during the trial.

John A. Deasy, for plaintiff in error.

E. S. Morrissey, contra.

GORMAN, J.

Plaintiff in error, Henry Kreimer, was charged in an affidavit filed in the Municipal Court of Cincinnati on August 30, 1915, with having knowingly and unlawfully allowed to remain open on the first day of the week commonly called Sunday a certain room in which intoxicating liquors were sold on other days of the week than on Sunday, contrary to the form of statute in such case made and provided.

This was a case involving a violation of Section 13050, General Code, which prohibits places being open on Sunday which are on other days of the week used for the sale of intoxicating liquors.

1916.]

Hamilton County.

Upon this affidavit a warrant was issued, and Kreimer was apprehended and appeared in the municipal court on August 30. He asked and obtained a continuance of his case until September 15, 1915. On that day the following entry was made:

“This cause coming on for hearing upon the affidavit and warrant filed herein, defendant being in court and arraigned, pleaded not guilty and court hearing the testimony find said defendant guilty and do order said defendant to pay \$25 and costs, but upon further consideration court do order \$15 of said fine to be suspended.”

Section 13050, General Code, among other things also provides for a second offense, for keeping open a place on Sunday where liquors are sold on other days of the week, and that the party convicted shall be fined or imprisoned. Therefore, it appears that if the case were a second offense against Kreimer he would be entitled to a jury trial; and unless the record shows that he waived a jury trial, it would be error to proceed to try him without the intervention of a jury.

The record in this case consists only of the affidavit, the warrant, the entry of continuance and the judgment entry above set out. There is no bill of exceptions, and we have no knowledge of what evidence was adduced on the trial before the municipal court.

Kreimer prosecuted error to the common pleas court, which affirmed the municipal court, and he is now in this court claiming error on the part of the municipal court and the common pleas court, and asking for a reversal of both judgments. He claims that, under Section 54 of the Greenlund act (103 O. L., 239):

“At all trials for offenses under laws or ordinances regulating the sales or traffic in intoxicating liquors the court shall * * * before the trial take testimony to determine whether or not the defendant is a licensee * * * and if it appears that such defendant is a licensee whether such licensee has in fact been convicted of a previous offense under said laws or ordinances; and if the fact be that said licensee has suffered a previous conviction under any of said laws or ordinances, or that a conviction in the case pending will work a revocation of

a liquor license granted in this state, the said licensee * * * shall be entitled to a trial by jury."

Now it is contended by counsel for Kreimer, plaintiff in error, that the record fails to show—as it does—that an examination was made by the judge of the municipal court in Kreimer's case to determine whether or not he had suffered a previous conviction for a violation of the liquor laws, and that by reason of the failure of the record to disclose such an examination the municipal court had no jurisdiction to hear and determine the case and impose the penalty upon Kreimer.

There is no presumption of error in the trial of a case, and in order to warrant a reviewing court in reversing a case for error the error must be apparent in the record and prejudicial to the party complaining. The record in this case discloses that Kreimer's was a first offense. The affidavit shows it to be a first offense, and the judgment and finding also disclose the case to be a first offense. We have no record of what transpired before the judge of the municipal court as to the examination of Kreimer before the trial, nor of the testimony that was taken on the trial. For all that appears in the record the judge of the municipal court may have examined Kreimer and other witnesses before the trial and found that the charge made against Kreimer was a first offense. We can not assume that it was the second offense, especially in the face of the record which discloses it to be a first offense.

Judgments of a court are presumed to be regular and valid until they are shown to be irregular or invalid. The municipal court had jurisdiction to try Kreimer, in case it was a first offense, assuming that he was a licensee; but where the record fails to show that he was a licensee, as it does in this case, and where it fails to show that the court omitted to take testimony as to whether or not it was a first offense, no error appears affirmatively in the record that would warrant a reversal of the case.

If the plaintiff in error desired to protect himself in case the offense charged was a second one, it was incumbent upon him to have the record in the municipal court brought into this

1916.]

Licking County.

court so that we might be apprised of the proceedings in that court; and if that record should disclose that it was a second offense and the court proceeded to try him, as it did, without the intervention of a jury, then manifestly the judgment would be erroneous and would call for a reversal.

The record therefore fails to show any error prejudicial to the plaintiff in error which would warrant a reversal of the judgment.

Some question was made in the argument of the case as to whether or not the defendant had paid his fine and costs, and it was suggested that the case before this court was only a moot case because of the fact that plaintiff in error could not complain inasmuch as the judgment of the trial court had been satisfied by the payment of the fine and costs. It is sufficient to say that the record fails to show that the fine was paid by Kreimer and therefore the question is not presented as to whether or not a person who has been convicted of a misdemeanor and has paid his fine, may prosecute error to reverse the judgment.

The judgments of the municipal court and of the common pleas court are affirmed.

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

**RESPONSIBILITY FOR SAFE TRAVEL OVER ROADS BEING
IMPROVED BY STATE AID.**

Court of Appeals for Licking County.

JOSEPH BROWNFIELD ET AL V. LEON CLAPHAM.

Decided, March Term, 1916.

*County Commissioners—Liable for Negligence—Resulting in Injury
to a Traveler on a Road Reconstructed by State Aid—Section 2405.*

1. A party suing in tort has the right to join or omit to join the different joint tort feorsors as parties to his action for damages.
2. The duties of the state highway commissioner with reference to the construction of roads by means of state aid are ministerial or advisory, and the responsibility for keeping in a condition for

safe travel a road undergoing such reconstruction rests upon the county commissioners, and liability arises against them where a traveler over such road who is injured as a result of negligence by the contractors in the prosecution of the work.

J. W. Horner, Prosecuting Attorney, and *Fitzgibbon, Montgomery & Black*, for plaintiffs in error.

Smythe & Smythe, contra.

POWELL, J.

This action was brought by the next friend of the defendant, Leon Clapham, a minor, to recover damages for personal injuries sustained by him by reason of the alleged negligence of the defendants, the county commissioners of Licking county, Ohio, in the construction of an improved public highway.

The negligence complained of was the stretching of a fence wire across a public road leading from Granville to Newark, and which road was under process of improvement by the construction of a cement track upon said road.

The petition sets out the negligence complained of and the acts out of which the accident grew, and the plaintiff below, now defendant in error, Leon Clapham, was injured.

No question is made as to the injury suffered by the defendant in error, or as to the serious nature of the same.

The plaintiffs in error complain that they are not liable for damages, and urge several reasons why the verdict of the jury, awarding such damages, should be set aside.

The errors charged and insisted upon are:

1. That the contractors who were constructing said improved highway, and who were made defendants to the original petition, had been dismissed from the suit.

2. That the county commissioners are not liable.

3. That the evidence shows contributory negligence on the part of the plaintiff below.

As to the first error complained of, viz: that Gregg and Pletcher, the contractors, had been dismissed from the suit. We think there was no error on the part of the court in such action; that the petition shows that if there was any liability on the

1916.]

Licking County.

part of Gregg and Pletcher it was because they were joint tort feasons with the commissioners in the acts out of which such accident occurred, and that a party suing in tort has the right to join, or omit to join, the different joint tort feasons in his action for damages.

It was not necessary to have made Gregg and Pletcher defendants in said action if plaintiff had seen fit to sue the commissioners alone, as he had a right to do; and having such right, we do not think there was error on the part of the court in dismissing them from the action.

The second alleged ground of error is of more difficulty and of more importance, viz: that the commissioners of the county were not liable in damages for the injuries sustained. It is contended that because the road in question was being improved under the supervision of the state aid department the liability, if any, for negligence can not rest against the commissioners, but only against the state highway commissioner, or parties under him, having immediate charge of such improvement work.

Section 2408 of the General Code provides for the liability of county commissioners for acts of negligence in the keeping of public highways in repair. It is contended that this section is repealed by implication by the statutes relating to the construction of public roads by means of state aid, or under the provisions of the state aid statutes. It is not claimed that this section of the statutes is expressly repealed.

Upon examination of the statutes the court is of the opinion that the provisions of law relative to the construction of public highways by means of state aid do not repeal by implication the authority of the commissioners in the construction, improvement and repair of public roads, nor do such statutes relieve the commissioners from liability for not keeping the public road specified in said section in repair. We think that if the acts complained of constitute negligence on the part of the officers having charge of such road, and a liability accrues thereunder, such liability accrues under and by virtue of the provisions of Section 2408; and while the provisions of the statutes relating to the construction of roads by state aid requires that the con-

tract for the improvement should be made by the state highway commissioner, yet it must be made with the consent and approval of the county commissioners, and that all the duties required of the state highway commissioner in the construction of such road are duties which are ministerial or administrative and relate wholly to the expert knowledge which such highway commissioner is supposed to have relative to the construction of such roads; that the responsibility for keeping the public roads in repair while such construction work is in process rests wholly with the commissioners, and that it is their duty to provide for safe travel upon the public highways of the county upon state and county roads.

The court is of the opinion that the commissioners are liable for damages in cases of this kind.

It appears from the record that the plaintiff below, who was a minor eighteen years of age, was riding upon a motor-cycle at the time when the accident complained of occurred; that a fence wire had been stretched across the road, which was in process of improvement, as a barricade to prevent travelers passing over the road while the cement, out of which the improvement was made, was green; that the wire was left bare and unguarded and could not be easily seen by travelers upon such highway; that plaintiff, with a friend, both of whom were riding the same motor-cycle, ran into such wire, and by reason thereof the injuries complained of occurred. Was the act of the commissioners, or the contractors who were working under the supervision of the commissioners and the state highway commissioner, in placing such wire across the road, an act of negligence which would render them liable for damages? The court is of the opinion that it was; that a barricade of this kind should not have been placed upon such road without some notice attached thereto that there was such a barricade; that if damages were sustained by reason thereof a liability ensued on the part of the commissioners; and we think that there was such liability in this case.

We think there was no error on the part of the court below which would justify this court, as a reviewing court, in setting aside the verdict and the judgment rendered thereon.

1916.]

Hamilton County.

We have examined the record with particular reference to each error assigned on the part of the plaintiff in error, and think that the judgment of the court below should be affirmed.

Judgment affirmed.

SHIELDS, J., and HOUCK, J., concur.

**PROSECUTION FOR FAILURE TO MAINTAIN AN
ILLEGITIMATE CHILD.**

Court of Appeals for Hamilton County.

STATE OF OHIO v. JOHN BONE.*

Decided, February 7, 1916.

Evidence—Action to Compel Putative Father to Support Child—Competency of Testimony of Mother of the Child, a Married Woman—Sections 12970 and 13008.

1. The wife is a competent witness to testify to the non-access of her recreant husband, in a criminal case against the putative father of her illegitimate child, for failure to provide said child under sixteen years of age, with necessary and proper food, clothing and shelter, under the provisions of Section 12970 of the General Code.
2. The father could have been prosecuted under either Section 12970 or Section 13008 of the General Code, but prosecution under the latter section could not be had in the Municipal Court.

*Motion for an order directing the Court of Appeals to certify its record in this case, overruled by the Supreme Court, April 25, 1916.

John V. Campbell, Prosecuting Attorney, *Walter M. Locke*, Assistant Prosecuting Attorney, *Ellis B. Gregg*, representing the Ohio Humane Society, for the state.

John W. Cowell, contra.

The husband of the prosecuting witness, Mrs. Barber, at the time of the filing of the affidavit in this case had abandoned her and had been missing for nearly three years. Bone, the defendant, had occupied the relation of husband to Mrs. Barber for about two years, during which time she became pregnant and

was abandoned by him. After the birth of the child he refused to provide for it, and this proceeding was commenced in the municipal court of Cincinnati, to compel him to do so. At the trial of the case the wife and mother of the child was offered as a witness to prove the non-access of her husband, and against the objection of defendant's counsel was permitted to testify to that fact. It was contended by counsel for defendant that this was error and that the defendant could not be prosecuted under the provisions of Section 12970 of the General Code, but that the prosecution should have been brought under the provisions of Section 13008, which in express terms provides for the prosecution of the father of illegitimate, as well as legitimate children, while Section 12970 does not make such provision. The defendant was convicted; error was prosecuted to the judgment of the municipal court to the court of common pleas, which reversed the municipal court; to the judgment of reversal error was prosecuted to this court.

JONES (E. H.), P. J.

Defendant was convicted in the municipal court of failure to provide for his seven months' old child. The court of common pleas, whose action is under review, reversed the judgment. We think it erred in so doing.

There was testimony of several witnesses showing non-access of the recreant husband of Mrs. Barber, the mother of the child. The testimony, together with letters and statements of the accused admitting that he is the father of the child, were sufficient to justify conviction. Every word of the evidence seems admissible and was given by competent witnesses. There can be no question but that the father could have been prosecuted under either Section 12970 or Section 13008 of the General Code, although prosecution under the latter section could not be had in the municipal court.

So finding, it follows that the judgment of the common pleas court will be reversed, and that of the municipal court affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

1916.]

Cuyahoga County.

**COMMENT ON THE QUALIFICATIONS OF A CANDIDATE
FOR PUBLIC OFFICE.**

Court of Appeals for Cuyahoga County.

EARLE A. FOSTER v. MAYO FESLER AND TEN OTHERS.*

Decided, May 22, 1916.

Libel and Slander—Publications Concerning Candidates for Public Office—Criticism Which is Truthful and Wholesome Not to Be Discouraged—But Defamatory Matter Can Not be Defended on the Ground of Privilege.

1. Temperate and truthful criticism of the career, ability and fitness of a candidate for public office, and considerate and informing advice to voters as to the best manner in which they can exercise their right of franchise, where given in a proper spirit and for justifiable ends, is a wholesome thing and should not be discouraged in a government bottomed on healthy public opinion.
2. For a civic league to publish of and concerning a candidate for office that "His ousiness and court record is such that, in our opinion, he is entirely disqualified for the Legislature; he should be defeated," is not libelous *per se*.

Cornelius Maloney, for plaintiff in error.

Ford, Snyder & Tilden, contra.

GRANT, J.

Error to the court of common pleas.

The plaintiff sued the defendant in an action for libel. The cause was brought to a trial in the court of common pleas upon the fourth amended petition, to a jury.

An objection was made to the hearing of any evidence on the part of the plaintiff, on the assigned ground that the petition alleged no sufficient facts to constitute a cause of action against the defendants, or any of them. The objection was sustained.

The defendants then moved for a dismissal of the action. The motion was allowed. The defendants thereupon moved for

*Affirming *Foster v. Fesler*, 19 N.P.(N.S.), 12,

a judgment in their favor for their costs made. This motion also was granted. The plaintiff moved for a new trial. The motion was denied. The plaintiff prosecutes this proceeding to obtain a reversal of the judgment named, 'alleging error in the action of the trial court in the respects mentioned, prejudicial to his rights.

The petition upon which the plaintiff's action was attempted to be brought to trial declared as upon a false and malicious libel perpetrated by the defendants, it was said, upon and against the plaintiff, who was at the time a candidate before the electors of his county for nomination to the office of member of the General Assembly of Ohio.

The defendants were charged, collectively, with being the "executive board" of the Civic League of the city of Cleveland, a body whose function or service, if it is understood, was to furnish the public, gratis, with advice and information concerning the qualities and fitness of aspirants for office, the particular information and counsel said to be libelous in this instance being published by them, or at their instigation or instance, in the *Cleveland Leader*, a newspaper.

The libel, if such it was, is said to have lurked in the following language of the publication: "His business and court record is such that, in our opinion, he is entirely disqualified for the Legislature; he should be defeated."

It is contended on the part of the plaintiff that these words are of themselves, and without more, libelous.

Whether they are so or not it is our business now to inquire and determine. Their libelous character and quality, as deduced by the pleader and embodied in the innuendos annexed to them by the petition, are of the tenor and effect that they would be understood by readers of them to mean, and were intended by the defendants to mean, that the plaintiff's record in the courts and in his business was evidence of his depravity and want of integrity, to such an extent as totally to unfit him for the duties of the office to which he aspired.

Another form which our present inquiry must take is, whether the meaning thus attributed to the published matter is justified

1916.]

Cuyahoga County.

by the words themselves; for, of course, the language is not to be broadened by innuendo beyond its plain and ordinarily accepted import, in the absence of circumstances calling for a different meaning to be imputed to it, and no such circumstances are apparent in this case.

We quite agree with the contention that while a candidate for public office necessarily and properly puts his own record in issue, in order that the people may be honestly served, he does not thereby become a target for indiscriminate slander from the various mud-batteries always to be encountered on such occasions. A man's rights as a citizen are not submerged in the slimy pools of partisan politics. His candidacy for the suffrage of his fellows is, or should be, an honorable thing; and it does not authorize letters of marque and reprisal to be issued against him, nor denunciation of him as a legal leper. His reputation ought to be even more valuable to him in that relation, and it may not be falsely and without cause assailed with impunity by the tongue of falsehood or the impassive types of libel. In such case he is entitled to the redress which the law gives persons thus aggrieved, whether his detractors are officious intermeddlers or syndicates of saints posing as the guardians of the public welfare, uplifters at large, one of the two who went up to the temple to pray (not the publican), or just plain campaign liars.

On the other hand, temperate and truthful criticism of his history, his ability and fitness for the place to which he aspires, considerate and informing counsel by those qualified to give it, to the voters whose advantages for coming at the truth of the matter are less influential than theirs—such advice, we say, given in a right spirit and for justifiable ends, is a wholesome thing in a government bottomed on healthy public opinion, and is not to be discouraged.

To find out in which category the publication complained of falls, we are to examine, carefully, the language used, and find from it, if we can, its real meaning as this would strike the ordinarily reasonable man who, under the circumstances, might have read it. Upon the result of that inquiry we must determine whether the words are or are not libelous of themselves.

In order to be so, they must fairly and obviously impute to the party complaining of them, first, an offense indictable at law, involving in its perpetration moral turpitude or visitable with an infamous punishment; second, an offensive disease or other disgrace of a social character, importing the exclusion of its victim from reputable society; third, conduct which, if true, would be calculated to injure him in his calling, business trade or profession.

For present purposes, we may at once exclude from this consideration the last two of these classifications, and limit the inquiry to the first of them.

Accordingly, we are told by the petition that the avocation of the plaintiff is that of a plumber.

It does not follow, necessarily, that because a man is a plumber he is plumb. The word has a different derivation. In fact and according to common and daily observation, many people maintain that many plumbers are—to use the language of a former schoolmaster of ours—“on the contray, quite the reverse.” Their methods of doing their work, and especially in the rather important matter of charging for it, are roundly denounced by the uncharitable, and by some who are charitable. If the half that is commonly said of plumbers and the ways of their craft is to be believed, then many plumbers would, if elected to the Legislature, be uninfluential members, to say the least of the matter, and, in that view and that sense of the word, be in a degree “disqualified for the Legislature.” Their trade name would in that respect be against them. Is it quite certain that the words used in the publication before us, so far as they purport to go to the plaintiff’s “business record,” when fairly and reasonably read, mean any more than that, to an intending voter whose only wish is to cast his ballot for the best candidate and to do so intelligently and advisedly? If they do not, then the quality of this part of the publication is not libelous of itself and the charge in that respect is not made out.

Or, the words may reasonably be considered in their proper relation to the successes or failures of the plaintiff in his busi-

1916.]

Cuyahoga County.

ness. Non-successes in business, no matter how pronounced or oft repeated they may have been, are, unhappily, no deterrent to running for office by the man who has achieved them. It is the infirmity of many men—including, we are pained to believe, most seekers for office—that a career of the most ghastly failure in their private affairs is just the thing to fit them to manage the affairs of the public. A half-baked accident who breaks down in business vainly imagines himself just the man to transact the business of everybody else, and seeks votes accordingly. Against such candidacies voters who are not informed should have the counsel of those who are.

It may be that the words of the publication imputing disqualification to the plaintiff have this significance. Of themselves, they do not import more or a worse deduction than that. Neither of the suppositions to which we have so far referred charges upon the plaintiff a crime, or even an offending against common personal or business morality, that we can see. Noise and clamor about plumbers, however inconsiderate or unfounded, derision of the perpendicularity of their charges, may very seriously cripple a plumber's influence and usefulness as a member of the Legislature, but do not impute to him, even remotely, as it seems to us, an indictable offense or import moral turpitude in his conduct. And no more does the severest animadversion of his unsuccesses in business, although the fact of them may beget an able-bodied suspicion that he will not be likely to do a service to the public more usefully than he has been doing for himself, and this suspicion in turn may reasonably engender an opinion which may, with entire propriety, be conveyed to the voters, that he has not the proper qualification for the office which he asks them to give him.

So that, as thus measured, the criticism of the plaintiff's business record, embodied in the alleged libelous matter, is not obnoxious to the conclusion charged against it, and does not fulfill the canon of what in our law amounts to a libel *per se*, as appears to us.

The conclusion as to the result to be come at from the plaintiff's charged "court record," as contained in the publication, is

of greater difficulty, perhaps, or probably. A discriminating analysis of the language in this respect, however, may serve to clear up the obscurity.

Not every court record is a criminal record, happily; and on the civil side our courts are full of litigants, brought there from various motives and for different reasons. Some men are inherently quarrelsome, and so get into trouble often, and the court is the resort of themselves or their neighbors as a sort of safety-valve to straighten out their troubles or settle their fights. Others are chronically in financial straits, or habitually refuse to pay their debts till sued. Others develop litigious habits, seek trouble with their customers, and, of course, find it, and reach the courts for settlement of their rows.

It is quite possible, and indeed quite a frequent thing, within common knowledge, for men to have a court record in some of the respects mentioned, and we can not say that plumbers, more than other men, are exempt from the infirmities or the misfortunes which may and do result in that kind of a court record. Perhaps as often as any other class are they accused of charges bordering on the extortionate. A newspaper last winter, noting the arrival of the first strawberries in January, vouchsafed the single comment that nobody but plumbers were buying them. The accusation in any case may be unjust, but that it is commonly made illustrates the point in hand; and many have made merry at the poor plumber's expense in this regard. A neighbor of mine, inveighing against his plumber's bill, remarked that the latter should have been a cavalryman—he was so good on a charge. The astute philosopher who was able to transform a well known proverb into “A little widow is a dangerous thing,” is supposed to have translated “It never rains but it pours” into “It never drains but it costs.” Still plumbers are entitled to be protected in life, limb, property and reputation, as well as all others. That some make them objects of derision does not turn them into legal outcasts.

Such a court record as we have instanced imports no crime, suggests none. It involves no inference of moral turpitude. It does not tend to disgrace the craft who are parties to it. On

1916.]

Cuyahoga County.

the other hand, it may unfit a party to it for the useful discharge of a legislator's duties. Uncharitable people—and indeed prudent people who desire useful service at the hands of their chosen law makers and to have none but men of weight, influence and reputation in that position—all good citizens in fact—will say, and rightly say, that a man much in courts—whether from choice or necessity matters not—must be shorn of much of the power and opportunity for good and effective work as their representative in the Legislature. And so regarding the matter, it is the right, and it may be the duty, of men conversant with the facts and the records, to counsel voters who are not otherwise informed in that respect. We can see no impropriety in it, and much less can infer from it a wanton and malicious desire to injure the reputation of one who, by seeking votes, puts that reputation, measured by his record in courts or out of them, before his wished-for constituents into the limelight of public scrutiny and judgment.

May not, it is asked again, the publication complained of here, be as fairly and naturally and reasonably read in this light, as in the harsher and more censorious aspect of imputed criminality or disgrace? And would not the common sense of the people, which Guizot so finely called "the genius of humanity," so read and apply it?

We think that the people who would be likely to read and heed the counsel which the defendants undertook to give them in the publication—men in the habit of reading such things and capable of reading them soberly and thoughtfully, would be likely also to read them in the light of a charitable rather than a sinful construction of the words employed to impart the advice tendered for their information and guidance in the duties of free electors.

But, it will be asked, may they not read them in the other view? Beyond question there may be men who would so read them. The stormy petrels of society would so read them, men to whom, like Sterne's Smelfungus, everything looks green, would see in an adverse criticism of one's business and court record only the inference of criminality and the devious trail

of a scoundrel and a crook, and from their constitution could look at the charge in no other light. Undoubtedly there are such men; but they are, fortunately for the common well-being, in a sad minority, and do not furnish the just standard of judgment upon which the public desire to proceed in voting men into or out of office, or upon which customarily, as we believe, they do proceed, or we should proceed.

Even if the words charged as being defamatory could be regarded as reasonably importing a criminal paper record, and if it is also held that this in turn foreshadows an infamous punishment—on paper, also—it is difficult to see how, on that account, they could be considered as in themselves actionable—no element of moral turpitude being apparent from the language used—since in our time there is practically no real penalty annexed to many a committed crime—perhaps most of them—the criminal being customarily golden-ruled and let go with a speech of half apology and half compliment, the prevailing tone to-day, both as to law-makers and supposed law-enforcers, being distinctly deferential to lawlessness.

The result of our examination of the words alleged to be libelous here, following the analysis to which we have attempted to subject them, is that they are of themselves not reasonably susceptible of the defamatory meaning charged, and we so find and hold. They purport on the face of them to rest on opinion only, and such opinion being, to our apprehension and according to the rule of right reason, to the innocuous purport mentioned.

If we are right in so finding, then the court below was right in refusing to hear the evidence tendered; because in that case the question is one of law for the court to solve, and there is nothing to be submitted to a jury. The rule as announced in *Hays v. Mather*, 15 Ill. App., 30, and adopted in *Newell on Slander and Libel*, Section 645, is as follows:

“Where the words of an alleged libelous publication are not reasonably susceptible of any defamatory meaning, the court is justified in sustaining a demurrer to the declaration. But if they are reasonably susceptible of two constructions, the one innocent and the other libelous, then it is a question for the jury which construction is the proper one.”

1916.]

Cuyahoga County.

We are of the opinion that the words here are not capable of the meaning ascribed to them by the innuendo annexed to them in the petition, and that their natural and normal significance does not justify an inference of a crime indictable at law, punishable infamously, and importing moral turpitude. Reasonably construed, they amount to no more than the fair and temperate criticism which, by becoming a candidate, the plaintiff invited and which he ought to bear. By them he has not, as we look at the matter, been libelously assailed. And the voting public were entitled to the saving warning intended by the publication, if the non-criminal record of the plaintiff as a man of business and a litigant warranted it. "By their fruits ye shall know them" is still healthfully true; and we are to remember that it is the plaintiff alone who is insisting that the fruits are forbidden fruits. The defendants and we are more charitable in this respect than he is. He says that his townsmen, the defendants, charged him with being a criminal. We say not.

It follows from this that the intent of the defendants in causing the publication to be made is immaterial. It is said in *Mosier v. Stoll*, 119 Ind., 244, that if the publication does not contain a libelous charge, no action will lie, no matter what the author intended. But in the case at bar the motives of the defendants unquestionably were proper. They thought they were doing a real service to the public in making the publication, and it is not apparent to us that they were not.

We have endeavored to reach a conclusion in this case from premises founded in principle. The law applicable is so well settled that it need not be further discussed. It is probably not necessary for us to say that if the published matter were of itself actionably defamatory, the charge could not be met on the ground that it would be privileged.

Upon the best consideration we have been able to give the question before us, and having what we trust is a mindful regard for the rights of all the parties, we are satisfied that no error injurious to the plaintiff is to be found in the record under review, and the judgment complained of is, therefore, affirmed.

MEALS, J., and CARPENTER, J., concur.

AS TO THE VALIDITY OF AN ISSUE OF MUNICIPAL BONDS.

Court of Appeals for Hamilton County.

THE CITY OF CINCINNATI, BY CHARLES A. GROOM, ITS SOLICITOR,
v. GEORGE PUCHTA, MAYOR, AND WILLIAM
LEIMANN, AUDITOR.*

Decided, April 24, 1916.

Bonds—Validity of an Issue by a Municipality—Where Publication of Notice of Election as to Authorization of Issue—Was Not Published for the Full Statutory Period—Restriction on Amount of Issue—Where the Authorization is by Majority Vote Only—Sections 3946 and 3952.

1. Failure of election officials to publish, for the full thirty days required by law, notice that at an approaching election the question of authorizing an issue of municipal bonds will be submitted, does not render the election invalid as to said bonds, where the election was held in other respects in accordance with law and there is abundant evidence that knowledge of an intention to submit said question was brought home to the great body of the electors.
2. Where a bond issue is authorized by a majority but not by a two-thirds vote, Section 3952 limiting the issue to 2½ per cent. of the total value of the city property as listed for taxation is applicable, and the authorization is valid only within the limits of the 2½ per cent. restriction.

Chas. A. Groom, City Solicitor, for plaintiff.

Saul Zielonka, Assistant City Solicitor, and *John E. Bruce*,
contra.

Appeal from the Court of Common Pleas of Hamilton County,
Ohio.

JONES (Oliver B.), J.

This is an action brought by the city of Cincinnati by its city solicitor against the mayor and auditor of said city to en-

*Affirmed without opinion, *Cincinnati v. Puchta, Mayor*, 94 Ohio State,

1916.]

Hamilton County.

join the issue and sale of \$250,000 bonds for parks, playgrounds, boulevards and parkway purposes.

The case was heard upon appeal on the petition, an amendment to the petition, the answer of defendants, and upon the evidence.

The board of park commissioners of the city of Cincinnati, on the 15th day of April, 1915, declared by resolution that it was necessary to issue, for the purpose of carrying into effect the powers conferred upon it by law, \$1,250,000 of bonds of the city of Cincinnati, and transmitted said resolution to the city council. More than ninety days elapsed after said resolution was received by it without the council having passed the necessary legislation for the issuance of such bonds.

On the 19th day of August, 1915, the board of park commissioners filed a resolution and request with the board of deputy state supervisors and inspectors of elections of Hamilton county, Ohio, requesting said board to submit the question of the issuance of such bonds to the qualified electors of the city of Cincinnati in the manner provided by law for voting on such questions, at the next general election to be held on the 2d day of November, 1915.

Said board of deputy state supervisors and inspectors of elections caused the following notice:

“ELECTION NOTICE.—Notice is hereby given to the qualified electors of the city of Cincinnati that at the general election to be held in said city on Tuesday, the second day of November, 1915, the question of issuing bonds, by resolution of the board of park commissioners, will be submitted as follows:

“ ‘Shall the city of Cincinnati issue bonds in the sum of \$1,250,000 for parks, playgrounds, boulevards and parkways?’ ”

to be published in the Cincinnati daily *Times-Star*, a newspaper printed in that city, once a week for four consecutive weeks prior to said election, said publication commencing on the 7th day of October, 1915.

The election was so held on November 2, 1915. The total number of registered electors entitled to vote at such election

was 101,163; the total number of electors voting at said election was 96,282; and the total number of votes cast for and against the issuing of said park bonds was 81,064. Forty-seven thousand two hundred and ninety-four electors voted for, and 33,770 voted against the issue of said park bonds, the majority in favor of such issue being 13,524 votes.

It appears from the evidence that in addition to the legal notice published in the Cincinnati daily *Times-Star* above referred to, much notoriety was given to the fact that the question of voting upon the issue of park bonds would be submitted at the general election to be held November 2, 1915, by numerous publications in all of the newspapers of the city and by many public meetings at which the subject was presented by different speakers, and that the public generally were fully informed upon the fact that such special election on this question would be held.

In accordance with said proceedings and election, on November 23, 1915, the council of the city of Cincinnati duly passed an ordinance providing for the issue of bonds of said city in the sum of \$1,250,000 for park purposes, which ordinance was duly approved by the mayor and published according to law.

On December 3, 1915, the city auditor, in accordance with law, offered said park bonds to the trustees of the sinking fund of the city of Cincinnati, and said sinking fund trustees then accepted \$250,000 of said issue of bonds and rejected the remaining \$1,000,000 of said bonds. Said latter amount of bonds were then offered in accordance with law to the board of commissioners of the sinking fund of the school district of the city of Cincinnati, and afterwards to the industrial commission of Ohio, both of which bodies rejected the said bonds. Thereupon the city auditor duly advertised the sale of \$250,000 of said bonds according to law. Bids were received for same March 22, 1916, and an award was made to the highest bidders for the sum of \$268,175. This action was then brought to prevent the consummation of the sale under said award.

On the same day bids were received by the city auditor for the sale of \$200,000 bonds of the city of Cincinnati to be issued

1916.]

Hamilton County.

under an ordinance of council passed January 18, 1916, to provide funds to pay the costs and expense of improving and repairing streets, viaducts, bridges and culverts in said city. The original issue provided by said ordinance was \$280,000, of which \$80,000 was taken by the sinking fund commission on February 3, 1916.

A statement of the bonds already issued by the city and its net indebtedness thereunder was furnished in evidence, as was also a statement of the total value of all the property of such city as listed and assessed for taxation, from which statements it is agreed that if both sets of bonds are issued under the awards made by the city auditor on March 22, 1916, as above recited, the net indebtedness of the city, including such bonds, would then be in excess of two and one-half per cent. of the total value of its property, but not in excess of five per cent. of such value as provided in Sections 3941, 3948 and 3952, General Code.

The questions submitted for decision are:

1. Does the failure to advertise the legal notice of the special election strictly in compliance with General Code 3946 invalidate that election and the bond issue made thereunder.

2. Where the city council fails to issue bonds in accordance with the request of the board of park commissioners, and an election is had thereon by virtue of Section 4064, General Code, does a majority vote in favor of the bonds obviate the restrictions imposed by Sections 3941 and 3952, General Code? In other words, is the limitation of a bond issue authorized by a majority vote in such an election two and one-half per cent., or is it subject only to the limitation of five per cent. under the terms of Sections 3948 and 3952, General Code?

3. If such issue is in excess of the limitation allowed should the court enjoin the entire sale, or only so much of said bonds as would make the net indebtedness exceed the limitation imposed by law?

The requirements of Section 3946, General Code, in a municipality where a newspaper is printed, are that thirty days' notice

of an election for the issue of bonds shall be given in one or more newspapers, once a week for four consecutive weeks prior to such election. In this case the legal notice published by the board of deputy state supervisors and inspectors of elections was printed in a newspaper once a week for four consecutive weeks, but the first publication was only twenty-six days prior to the election instead of thirty days as required by law.

The purpose of such a provision of law is to fully advise the electorate of the submission of the proposition to be voted on, that a full expression may be had of the will of the people upon that question. So far as the duty of the election board is concerned, all of the details of the law should be strictly observed, and as to them the provisions found in 3946, General Code, must be considered mandatory; but where the objects to be accomplished have been fully met, and general notice of such approaching election has been had by the electors, and a full vote has been cast thereon evidencing such knowledge, the failure of the election officers to comply fully with the requirements of law must be deemed, so far as the election itself is concerned, an irregularity which will not invalidate it.

In this case it was shown that each elector was given a ballot upon the question of issuing these bonds, and considering the well known tendency of many voters to ignore questions of this character and to fail to vote thereon either at general or special elections, a large vote was cast upon the question, compared with the total vote. This in itself shows that the electorate were well informed as to the fact of such special election, and were not in any way prejudiced by the misfeasance of the election officers in publishing the legal notice for a period of twenty-six days instead of for the full period of thirty days. The election, therefore, must be held valid.

In *Foster v. Scarff*, 15 O. S., 532, the court says at page 537:

“We have no doubt that where an election is held in other respects as prescribed by law, and notice in fact of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid.”

1916.]

Hamilton County.

To the same effect are: *In re Chagrin Falls*, 91 O. S., 308, 312; *Fike v. State of Ohio*, 4 C.C.(N.S.), 81; *Harpster v. Brower*, 5 C. C., 395; *McCrary on Elections*, 4th Ed., Section 179; *Town of Grove v. Haskell*, 24 Okla., 707; *Ardmore v. State*, 24 Okla., 862.

2. The question of whether a favorable majority vote on the issue of park bonds provided for under Section 4064 and 4065, General Code, is still subject to the limitation found in Sections 3941, 3948 and 3952, General Code, has been disposed of by the case of *Henderson v. Cincinnati*, 81 O. S., 27. At the time of the decision of that case Section 3952 had not been enacted, and the limitation of four per cent. found in Section 3941 was held applicable to an issue of park bonds authorized as was the issue under consideration here. Section 3952 reduces that limit of four per cent. to two and one-half per cent. and under the decision of the Supreme Court referred to such limitation would undoubtedly apply here, where, as in this case, the bond issue carried by a majority vote and not by a vote of two-thirds.

3. The question of the legality of any issue of bonds under the proceedings had, has also been discussed by counsel. It is conceded that, so far as the \$250,000 of park bonds taken by the board of sinking fund commissioners is concerned, they are within the limitation of two and one-half per cent., and they are, therefore, valid bonds. It is questioned whether there was authority in the board of park commissioners to request, and the city officers to order, the issue of less than the full amount of park bonds authorized which had not been taken by the sinking fund commissioners, viz., \$1,000,000. While no positive provision is made in the ordinance authorizing the sale of these park bonds, for selling them at different times in different parcels, it would seem the common-sense view to take of the matter that it was not intended by council that in the absence of immediate need of the full value of \$1,000,000 the park board would not have authority to sell an issue of less than that amount sufficient for their needs from time to time. In the opinion of this court, there is no objection to the fact that but \$250,000 were advertised and sold in the award under question here. But, as

held by the Supreme Court in the Henderson case, there is nothing in the park bond law that dispenses with the general limitation imposed by Sections 3941, 3948 and 3952, General Code, and as the favorable vote for the issue of these bonds was not the two-thirds vote provided for in Section 3947, General Code, the limitation applicable here must be two and one-half per cent. rather than five per cent. of the total value of the city property. Up to the extent, therefore, of two and one-half per cent., the issue of these bonds would be legal.

The determination of just what sum can be issued is further involved by the fact of the attempted sale of street repairing bonds at the same time. It appears that the ordinance for the issue of the park bonds was prior in time to the ordinance for the issue of street repairing bonds, and because of that fact it would appear to be entitled to precedence. But Section 3950, General Code, fixes the time when an indebtedness shall be deemed created or incurred, and the determination of which indebtedness is first incurred is left to the decision of the proper officers of the city as a matter of official action, rather than to the determination of this court upon such presentation as here made, it being understood, however, that no bonds can be issued in excess of the total limitation imposed by law.

A decree may be drawn enjoining the issue and sale of any bonds in excess of the amount fixed by such limitation, which doubtless can be agreed upon by counsel.

JONES (E. H.), P. J., and GORMAN, J., concur.

1916.]

Hamilton County.

RIGHTS OF ONE EXPELLED FROM A HOME FOR THE AGED.

Court of Appeals for Hamilton County.

MARGARET J. DENNEDY AND MICHAEL DENNEDY v. THE ST.
THERESA'S HOME FOR THE AGED ET AL.*

Decided, February 7, 1916.

Payment for Maintenance for Life in a Home for the Aged—Constitutes a Binding Contract—Expulsion Entitles an Inmate to Maintain Proceedings With Reference Thereto—Error in Rejecting Evidence as to the Procedure Followed.

1. Courts will treat as a binding contract an agreement whereby a home and maintenance for life are promised by a home for the aged to one who has paid a specific sum in consideration for such promise.
2. Where an inmate in such an institution under such a contract is expelled therefrom, it is error to refuse free latitude in showing resulting hardship and damage together with the nature thereof.
3. It is also error to deny to an inmate who has been expelled the privilege of showing any irregularity of defect in the proceedings leading to the order of expulsion, including the nature of the charges, the hearing thereon, and all things connected with the order of expulsion.

J. M. Dawson, for plaintiffs in error.

E. S. Morrissey, L. F. Ratterman and M. F. Roebeling, contra.

JONES (E. H.), P. J.

There is a petition in error in this case asking a reversal of the judgment of the superior court dismissing the petition below. The petition was by Margaret Dennedy and her brother, Michael Dennedy, who sought an injunction against the St. Theresa's Home for the Aged restraining it from ejecting the plaintiff, Miss Dennedy, from the home.

Miss Dennedy is seventy-three years of age. Her brother, Michael Dennedy, in 1911 paid to the St. Theresa's home the

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 16, 1916.

sum of \$500 on condition that his sister be provided a home and maintenance for life. Miss Dennedy's occupancy may have been probationary at first; but she has been there continuously and the record shows to this court's satisfaction that the contract became absolute and binding on the home not later than March, 1912.

The petition herein contains the necessary averments for injunction. It is not denied that action had been taken by those in charge of the institution to eject this old lady and that efforts were being made and steps being taken to make her leave. But it is claimed by way of defense that charges had been preferred, heard by the governing board and by it sustained, and that the order of ejection was based thereon.

As has been said, the rights of plaintiff are founded on contract, and in such respect differ from those of members of social, benevolent or religious organizations. Under her contract Miss Dennedy has acquired rights which courts of law must recognize and take cognizance of. But whether she must resort to a court of law for damages or can obtain relief from a court of equity is a question dependent upon the nature of her damage—as to whether or not it can be measured in money, and whether the law court can afford her adequate relief. See *Mulroy v. Knights of Honor*, 28 Mo. App., 463.

We call attention also, in this connection, to the case of *The Parliament of the Prudent Patricians of Pompeii v. Marr*, 20 App. Cas. D. C., 364. Paragraph 6 of the syllabus is this:

“Although, as a rule, the courts will not interfere to determine a person's ‘good standing’ in a fraternal or other association, when such good standing is based upon morals, religion, etc., yet when it appears that the governing body of a beneficial association has refused to pay a member's policy of insurance on the ground that the member was not in good standing and that such good standing was based merely upon the payment of dues and that such dues had been paid, the courts will not hesitate to take cognizance of the matter.”

We quote from the opinion in this case the following pertinent paragraphs:

1916.]

Hamilton County.

Pages 374-5: "Even if it could be held that in an incorporated association, such as the appellant is, a by-law could be sustained which would prohibit recourse to the ordinary tribunals of law, in regard to which we entertain very grave doubt; and even if in a voluntary, and especially, a religious organization, by-laws and regulations for the discouragement of litigation have been upheld, yet most undoubtedly, in order to preclude one from resorting to the ordinary tribunals of the land for the enforcement of purely civil contracts, there must be some express and specific agreement shown for the substitution of some other mode of settlement. No such agreement is shown here; there is no mode pointed out by the pleas for the settlement of claims like that of the appellee '*in the regular channels of the order.*' It is not shown that the appellees or George Marr, agreed not to have recourse to the courts in cases like the present. He who would oust the courts of the land of their ordinary jurisdiction, must show with specific distinctness what substitute therefor has been established; and it is not shown by the pleas in the present case that any officer or tribunal has been established to pass upon this class of claims."

Pages 375-6: "Courts of law, it is true, will not ordinarily concern themselves with the question of the good standing of members of social, benevolent and religious organizations. Matters of morals, or religion, or dogma, or discipline, or gentlemanly conduct, must be left to these organizations to be settled as best they can in their own way. But good standing, with reference merely to a civil contract, and which depends on the payment of dues to the organization, is a thing of which the civil courts will not hesitate to take cognizance."

In further support of the principle involved here and upon which plaintiffs rely for equitable relief, we quote from High on Injunction:

Section 30: "The mere existence of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction. Nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. To deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the

remedy in equity. And unless this is shown a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law."

Section 22: "By irreparable injury is not meant that the injury is beyond the possibility of repair by money compensation, but it must be of such a nature that no fair and reasonable redress may be had in a court of law, and that to refuse the injunction would be a denial of justice."

And Joyce, in his work on the same subject, says, Section 36:

"The injury is irreparable when it is of such a nature that the injured person can not be adequately compensated therefor in damages, or when the damages which may result therefrom can not be measured by any certain pecuniary standard."

This action is based on contract, as we have heretofore remarked, and as the petition plainly shows. The situation of plaintiff is different, therefore, from one who is a member of a benefit society, and her right to apply to a court for relief much more firmly established and generally recognized. Yet cases are cited and eminent authors quoted in the brief of counsel for plaintiffs in error showing that even members of such organizations have been given relief in equity where they could show that the threatened damage was irreparable and incapable of settlement upon a pecuniary basis.

Plaintiff was therefore entitled to show her inability to obtain adequate relief in a court of law. We can well imagine from the circumstances shown in the record the difficulty and lack of opportunity to procure a contract such as that held by plaintiffs. Such institutions are few in number. She may not have the money with which to again buy a home for life, and even if she could get the money she would be compelled to leave behind friendships and associations for which no substitute could be found in the new home.

In this case the trial court should have gone fully into such an inquiry and should have allowed great latitude to plaintiff in her attempt to show any hardship or damage and the nature and

1916.]

Hamilton County.

extent thereof which may be worked by her expulsion. In such manner only can the court determine her right to the relief prayed for.

The plaintiff was also entitled to show, if she could, any irregularity or defect in the proceedings leading to the order of expulsion. This would include the nature of the charges, the hearing thereon, and all things connected with the action of the board in expelling her. In denying these things to plaintiff in the trial below, we are of the opinion that the court erred to her prejudice.

The portion of the record where the errors occur is pages 66, 67 and 68, and we quote only a part:

On page 66: "Q. Now, in the case of charges that are preferred by the matron, that a party did not show her the proper respect—

"The Court: Gentlemen, we can not possibly go into all those details.

"Whereupon counsel for plaintiff offered to prove by letters and papers in this case that no material or substantial charges were ever preferred against the plaintiff, Margaret Dennedy, before the board controlling the St. Theresa's Home.

"Whereupon said tender of proof was rejected by the court, to which ruling of the court, plaintiff, by their counsel, at the time, excepted."

Page 67: "Mr. Dawson: I also offer to prove that the plaintiff in this case, Margaret Dennedy, made a demand, after being notified that a trial before this board was to be had, requesting a copy of the charges to be met by her, and that this demand was refused.

"Whereupon said tender of proof was rejected by the court, to which ruling of the court, plaintiffs, by their counsel, at the time, excepted.

"Mr. Dawson: I also offer to prove by documents in the matter, that this plaintiff made a demand for the names of the witnesses and that this demand was refused.

"Whereupon said tender of proof was rejected by the court, to which ruling of the court, plaintiffs, by their counsel, at the time, excepted.

"Mr. Dawson: I also offer to show by the papers in the case, that this plaintiff, Margaret Dennedy, demanded the right to be present with counsel at the inquiry into these matters

concerning her right to remain in the home, and that she was refused the right to appear with her counsel or to have the assistance of counsel in meeting the charges made.”

Page 68: “Whereupon the court rejected said tender of proof, to which ruling of the court, plaintiffs, by their counsel, at the time, excepted.

“Copies of said demand are hereto attached marked Exhibits H, I and J and made part hereof.

“Mr. Dawson: I also offer to show that the plaintiff in this case, Margaret Dennedy, has conducted herself strictly in accordance with all rules and regulations, constitution and by-laws, and that the expulsion or pretended expulsion of her by the Saint Theresa’s Home for the Aged, and its officers and directors, has been without any cause or excuse.

“Whereupon the court rejected said tender of proof, to which ruling of the court, plaintiffs, by their counsel, at the time, excepted.”

For error in rejecting this evidence the judgment is reversed, and the cause remanded for new trial.

JONES (Oliver B.), J., and GORMAN, J., concur.

ERROR IN DIRECTING A VERDICT FOR THE DEFENDANT.

Court of Appeals for Richland County.

BURTON, PRESTON & CO. V. NATIONAL GRANITE CO.*

Decided, February 2, 1916.

Right of a Litigant to Have His Case Determined by a Jury—No Authority in Trial Judge to Direct a Verdict Where Material Facts Are in Dispute—Application of the Rule to an Action on an Executory Contract.

Where facts necessary to a determination of the issue involved are in dispute, it is error to direct a verdict and such a situation is presented where there is conflict in the evidence as to material facts and some of the questions of fact are of such a character that different minds might arrive at different conclusions.

*Motion to require Court of Appeals to certify its record in this case overruled by the Supreme Court, May 23, 1916.

1916.]

Richland County.

J. W. Galbraith, for plaintiff in error.*McBride & Wolfe*, contra.

HOUCK, J.

The parties to this proceeding in error stand as they stood in the court below. The plaintiff brought suit to recover the sum of \$845, being the full amount it had paid to defendant on an executory contract for the purchase and delivery of four monuments which plaintiff claimed were not made according to the terms of said contract, and, further, that it had never accepted said monuments. The defendant filed an answer, being, in substance, a general denial. The case was tried to a jury, and after the plaintiff had offered its evidence the defendant filed a motion for a directed verdict, which was sustained by the court. A motion for a new trial was filed, heard and overruled. The plaintiff in error prosecutes error to this court seeking a reversal of the judgment below, and in its petition in error alleges several grounds of error, but in oral argument its counsel seems to rely upon one ground only, namely, that there were questions of disputed fact that should have been submitted to the jury for its determination.

We have examined the record in this case with much care, and we find the following questions of disputed fact:

1. Was the contract in question made and executed in Vermont or Ohio?
2. Were the monuments in question accepted by the plaintiff?
3. Were the monuments in question of the size, color and kind purchased by the plaintiff?
4. Did the agent of plaintiff in Vermont accept the monuments?
5. Did the plaintiff accept said monuments, or any part of same?

If these were questions of fact and were necessary for the proper determination of the issues involved in the present case, and they were disputed, then they should have been submitted to the jury for its determination. A motion for a directed ver-

dict involves not only an admission of the truth of the evidence, but it further admits the existence of all the facts which the evidence tends to establish. If the testimony be conflicting, the facts uncertain, or the proper inferences to be drawn therefrom doubtful, then and in that event the court would not be warranted in directing the jury to return a particular verdict.

It is the right of litigants in jury trials to have the weight and sufficiency of the evidence submitted to and passed upon by the jury, this being a right of which they can not be deprived by the trial judge, unless it is done with the consent and approval of the parties in interest. It therefore follows, if there is evidence tending to prove each material fact put in issue and indispensable to a recovery, that it should be submitted to the jury, under proper instructions from the court. Where there is no conflict in the evidence as to the material facts of the case, or where the material facts are conceded, and where the law admits of no inference from the evidence except that which is favorable to the defendant, a motion for a directed verdict made by the defendant might be properly sustained.

From an examination of the record in this case we find that there was a conflict in the evidence as to the material facts; that the material facts were not conceded; and we do not think it will be seriously claimed that no other inference could be drawn from the evidence except that which is favorable to the defendant. We further find from the record that some of the questions of fact were of such character that the testimony offered with reference to same was not only conflicting, but of that kind and character that different minds might have arrived at different conclusions. This being so, it was a question for the jury to determine. We cite in support of this doctrine the case of *Hickman v. Ohio State Life Insurance Co.*, 92 O. S., p. 87, where the court say:

“In order that an issue should be required to be submitted to the jury it is not essential that there be such a conflict in the testimony of different witnesses as makes it necessary for the jury to determine disputes or questions of veracity. That is not the only province of the jury. They have another important

1916.]

Richland County.

function and duty. Where there is no dispute or conflict in the testimony of different witnesses, but nevertheless the unconflicting testimony discloses a variety of circumstances from which different minds may reasonably arrive at different conclusions as to the ultimate facts shown by such evidence, then it is the duty of the jury to determine such ultimate facts even though the trial judge should himself be convinced as to what the conclusion should be."

The defendant contends that the doctrine laid down in the case of *Bowman Lumber Co. v. Anderson et al*, 70 O. S., 16, is decisive of the case at bar, the syllabus of the case being as follows:

"By an executory contract for the sale and delivery of chattels of a described grade or quality, the seller becomes bound to deliver goods of the character described, but in the absence of express terms of warranty no obligation is imposed upon him which survives the acceptance by the purchaser of an article delivered by the seller in good faith as in the performance of the contract, if the acceptance is with full knowledge of all the conditions affecting the character and quality of the article."

We agree with counsel for the defendant that this is a correct principle of law and is applicable to the particular case to which it is applied, but it is not applicable to the facts in the case at bar. In the present case the plaintiff denies that he accepted the monuments in question, and that being a question of fact which is disputed, and being one for the jury to pass upon, we do not see how the claim of defendant can have any force with reference to it being applicable to the present case. If the plaintiff had accepted the monuments, then it would have been bound to pay for same unless it alleged and proved fraud, but as it claims it never accepted them, and that being a disputed question of fact, the rule of law urged by defendant is not applicable to the facts disclosed in the present case.

We feel that we are supported in our theory of this case by a long line of authorities, not only in our own, but other states. Judge Ranney, speaking for the court in the case of *Ellis & Morton v. Ohio Life Insurance & Trust Co.*, 4 O. S., pp. 645 and 648, says:

“The law of every case, in whatever form presented, belongs to the court; and it is not only the right of the judge, but his solemn duty, to decide and apply it. He must determine the legal requisites to the right of action, and the admissibility of the evidence offered to sustain it. When all of the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, a question of law is presented, whether the evidence before the jury tends to prove all the facts involved in the right of action and put in issue by the pleadings. In deciding this question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree tends to prove must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, must be taken as fully established.

“Our conclusions upon this subject can not be better stated than in the clear and explicit language of one of the learned judges in the court below: ‘Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit can not be properly ordered; it is in no case a question as to the weight, but as to the relevancy of the testimony. If the testimony tends to prove a *prima facie* case for the plaintiff, a non-suit can not be properly ordered. Nor can facts tending to prove a defense on the part of the defendant, though proceeding from the witnesses introduced by the plaintiff, be considered on a motion to non-suit. If the defendant wishes to set up any such facts, he must resort to the jury to have them established.’ ”

As to the right of trial by jury Judge Wanamaker, speaking for the court, says in the case of *Gibbs v. Village of Girard*, 88 O. S., 47:

“So long as the trial by jury is a part of our system of jurisprudence, its constitutional integrity and importance should be jealously safeguarded. The right of trial by jury should be as inviolate in the working of our courts as it is in the wording of our Constitutions.”

The question presented for our consideration in this case is: Was the trial court justified in directing the jury to find a verdict for the defendant, in the light of the facts and the law applicable thereto? In view of what we have already said, and in the face

1916.]

Cuyahoga County.

of the facts presented by the record, and applying to the same what we feel are the well established principles of law governing these facts, a majority of this court is of the opinion that the trial judge was not warranted in sustaining the motion for a directed verdict in the case at bar, and that by so doing the court erred, to the prejudice of the plaintiff in error; and so finding, the judgment below should be reversed, which is accordingly done, and the cause remanded to the common pleas court for a new trial.

SHIELDS, J., concurs; POWELL, J., dissents.

NO BAR RAISED BY FAILURE TO SET UP COUNTER-CLAIM.

Court of Appeals for Cuyahoga County.

KATHERINE ENGEL v. M. L. ROTHMAN.

Decided, March 6, 1916.

Pleading—Action for Liquidated Damages Under a Contract—Defendant May Set Up Counter-Claim, or Waive It and Bring an Independent Action Thereon.

A defense, where the same facts constitute a counter-claim, may be withheld without estopping the defendant from asserting his claim later, and having waived it at the expense of having the costs assessed against him, he may proceed upon his counter-claim in a separate action for equitable relief.

R. J. Selzer, for plaintiff.

F. C. Scott and *M. L. Koblitz*, contra.

CARPENTER, J.

This case comes into this court on appeal.

It appears that the defendant, on the 14th day of May, 1915, recovered a judgment against the plaintiff, Katherine Engel, for \$1,000, being the amount stipulated in her contract with the defendant Rothman as liquidated damages.

In her answer in that case she set up as her sole defense a denial of her ownership of the premises which she had refused

to convey. Thereafter said defendant instituted an action in the court of common pleas to subject plaintiff's property on Dennison avenue to the payment of said judgment. The present suit is brought by plaintiff to restrain the defendant from proceeding to enforce the collection of said judgment, and from issuing any order of sale, and that said contract may be declared null and void.

In her petition plaintiff sets forth the recovery of said judgment; that her answer to the petition was solely a denial of her ownership of said premises, and alleges that the contract upon which said judgment was obtained and action thereupon founded, was procured by a conspiracy entered into by said defendant and one A. L. Simons, a real estate agent, acting in behalf of said defendant. That said Simons made various false representations to her which she was induced to believe, and relying thereon signed said instrument. The court below sustained the motion of said Rothman to dissolve the restraining order granted plaintiff upon the filing of her petition, and also sustained the general demurrer of said defendant to the petition, and the plaintiff not desiring to plead further, dismissed plaintiff's petition.

The question which accordingly arises is whether the plaintiff is barred from maintaining this action by failing in her answer to set up as defensive matter the allegations in her present petition.

It is true that the general rule is that a party when sued is bound to set up every defense, legal or equitable, or both, which he may have to an action, and effectually waives those not pleaded, but it is also true that a party having a counter-claim is not compelled to set it up in the same action. He may waive it, and at the expense of having to pay the costs as provided by the General Code, may institute an independent proceeding.

It will be remembered that plaintiff in her answer in the former suit pleaded only that she was not the owner of the premises, thereby bringing herself squarely within the rule.

In the case of *Lorraine v. Long*, 6 Cal., 452, the court say:

"Although a party may set up an equitable defense to an action at law, his remedy is not confined to that proceeding. He

1916.]

Cuyahoga County.

may let the judgment go at law, and file his bill in equity for relief. Our practice while it enlarges the field of the remedy does not take away pre-existing remedies by implication.”

In the case of *Hill v. Cooper*, 6 Ore., 181, on page 186, the court say :

“But we understand that respondent’s counsel do not strenuously contend that Hill might not have obtained the relief he now seeks in this suit, had he interposed the same as a defense by the way of a cross bill in equity to the action by Cooper against him to recover the possession of this land. But counsel for respondent now insists that having a right under the statute to interpose this equity in that action, appellant having failed to avail himself of such a defense, can not now, after having asserted in his answer in that action that he was the owner of the fee simple title, and that having been determined against him, come and assert his equity derived through the deed from Stratton to Patton. It is insisted by the counsel for respondent that it is the duty of a party defendant, who has an equitable defense to an action at law, to interpose the same by way of cross bill, as allowed by the code, and if he fails to do so, his right is lost and the determination of the action at law against him, will forever bar his equity. We think it was not the intention of the statute to place defendants in a worse position by giving them a right to interpose equitable defenses in legal actions than they were before. It was the intention of the statute to simplify legal proceedings and save expenses to litigants and at the same time save to them all their former remedies, if they saw fit to omit them. And such a construction has been given to a similar statute in other states. We think the proper construction of this statute is that it confers on a defendant in an action at law, the privilege to interpose an equitable defense if he has one, but that if he fails to so interpose, he may avail himself of his equity after a judgment against him, in the same manner as before this statute was enacted.”

In the case of *Witte v. Lockwood*, 39 O. S., 141, the syllabus is as follows:

“1. The general rule is that a defendant is bound to set up every defense, legal or equitable or both, which he may have to the action, and waives those not pleaded; but where the facts claimed to afford a defense are sufficient to constitute a counter-claim, there is an exception to such general rule.

“2. A defendant relying solely on his legal title, in an action to recover the possession of real property, and failing, is not estopped to maintain an action to correct mistakes in the deeds under which the parties to such action respectively claimed. He has his election to rely on such equitable title as a defense of a counter-claim, or he may maintain an action thereon.”

In its opinion the court say, at page 144:

“The inference that a *defense*, where the same facts constitute a counter-claim, may also be withheld without estopping the defendant, seems to be irresistible. It follows that Witt had his election to plead his equitable title as a counter-claim of a defense, or reserve it as he has done, for a separate action. The New York code of civil procedure, from which ours is largely borrowed, had received a construction in accordance with the view here expressed, before the adoption of our code (*Halsey v. Carter*, 1 Duer., 667). Mr. Pomeroy in his able work on the modern codes of civil procedure, states the rule in the same way (*Remedies & Rem. Rights*, Section 804); and we are led to the conclusion, after a laborious examination of the cases, that the position is impregnable.”

Under the foregoing authorities, we regard the rule as pronounced therein, as applicable to the facts of the case at bar, and fully answers the question at issue in favor of the plaintiff, and the demurrer will be overruled.

MEALS, J., and GRANT, J., concur.

1916.]

Stark County.

PASSENGERS AND INTENDING PASSENGERS DISTINGUISHED.

Court of Appeals for Stark County.

**JANE SINNOCK, ADMINISTRATRIX, v. THE PENNSYLVANIA
COMPANY.**

Decided, 1916.

*Charge of Court—As to the Degree of Care Due an Intending Passenger
by a Carrier.*

Whether an intending passenger, who is in and about the depot awaiting the arrival of the train he desires to take, is a passenger and therefore entitled to the highest degree of care, is a question which should be submitted to the jury under proper instructions; and to charge the jury that one injured under such circumstances was a passenger at the time of his injury constitutes prejudicial error.

FERNEDING, J. (sitting in place of Shields, J.).

A careful examination of the errors complained of in this case leads to the conclusion that the trial court in its charge to the jury omitted to distinguish between the degree of care a railroad company owes to an intending passenger in and about its station awaiting the arrival of a train, and a passenger actually aboard one of the railroad company's cars.

An intending passenger has to a greater or less extent control over his movements and can therefore exercise corresponding precautions to protect himself from danger. To this end, it becomes the duty of the common carrier to provide such station accommodations as are reasonably safe for persons exercising ordinary care.

When a passenger is actually aboard a train, he has substantially no control over his movements; he has, in effect, wholly surrendered himself to the care and control of the carrier, and the carrier must therefore exercise the highest degree of care to protect him (21 C. C., 288). This court followed this rule in the former hearing of this case.

The trial court in the present hearing charged the jury as follows:

“If you should find from the evidence in this case that John Sinnock went to the station that morning for the purpose of taking train 26 to Youngstown, and was upon the depot platform and went there for that purpose, *he was a passenger*, and if he was a passenger he was entitled to that degree of care which the law imposes upon a railway company which is the common carrier of passengers, and that degree of care, gentlemen, is the highest degree of care.” * * *

We are unable to escape the conclusion that such instruction was of such character as to prejudice the rights of the railroad company in imposing upon it a higher degree of care than was required.

As a matter of fact, the evidence tends to prove Sinnock was not a passenger upon any train. It is admitted he intended to board a train as a passenger, but whether he was or was not a passenger, we think was a question to be submitted to the jury under proper instructions. The court in effect announced in his charge to the jury that he was a passenger, and therefore entitled to the highest degree of care, and this, we think, was error.

The judgment of the court of common pleas will therefore be reversed, and the cause remanded for a new trial.

POWELL, J., concurs; HOUCK, J., dissents.

1916.]

Hamilton County.

PROCEEDINGS IN ERROR TO THE FINDINGS OF A REFEREE.

Court of Appeals for Hamilton County.

JOHN BRYAN V. D. DEMOTT WOODMANSEE.*

Decided, February 28, 1916.

Bill of Exceptions—Embodying Proceedings Before a Referee—How a Review May be Had—Effect of Striking Bill from the Files.

1. In order to review the findings of a referee on the evidence, a motion for a new trial must be filed and when overruled a bill of exceptions prepared and filed with the referee for his allowance and signature thereto, and a motion lies to strike from the files a bill of exceptions purporting to embody proceedings before a referee but in no way authenticated by him or by the judge of the court in which the referee was appointed.
2. The fact that the granting of such a motion leaves no bill of exceptions before the court does not authorize a dismissal of the petition in error, but the record as it stands, with the bill of exceptions excluded, showing no substantial error, the judgment will be affirmed.

Keifer & Keifer and Hosea & Knight, for plaintiff in error.
Chas. W. Baker and W. R. Collins, contra.

JONES (Oliver B.), J.

Each of the two actions which were consolidated into one before trial in the superior court, was brought for an accounting between the parties as to sundry transactions in which Bryan had furnished to Woodmansee sums of money from time to time to be invested for his benefit. Certain investments had been made by Woodmansee, and money had been repaid by him on account of principal and of interest or income, and he claimed to have fully accounted to Bryan, and offered to convey and transfer to him certain real estate, notes and other property still in his hands resulting from said investments. Bryan however refused to accept said property and insisted that Wood-

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 6, 1916.

mansee's account was not true and complete and that he should be held for all money received together with interest thereon; that he had guaranteed all investments made by him and should himself stand for and make good all losses that had occurred, and that he should be allowed no fees for any services rendered.

After the cases were consolidated and ordered to proceed under the case in which Bryan was plaintiff and Woodmansee defendant, and the issues had been made between the parties, on February 28, 1913, a receiver was appointed to take charge of certain property and securities and the case was referred to a referee to hear the testimony and report separate findings of fact and law.

The cause was duly heard by the referee, who filed his report April 13, 1914, finding on the facts that there was nothing due from Woodmansee to Bryan, but that allowing him reasonable attorney's fees for services rendered, his credits would be \$1,000 in excess of all proper charges against him, for which excess no judgment was prayed; and that as a matter of law, all possible claims in favor of Bryan were barred by the statute of limitations; and that the costs should be equally divided between the parties.

April 14, 1914, defendant filed a motion to confirm the report of the referee, and for judgment. April 17, 1914, plaintiff filed a motion to set aside the report of the referee. March 12, 1915, the report of the referee was confirmed, except that all costs were taxed against plaintiff, and judgment was entered for defendant.

April 19, 1915, a bill of exceptions was filed by plaintiff, in the court, which was allowed and signed by Judge Pugh. It appears to contain testimony and other evidence in the form of numerous exhibits; had before the referee, but it is not signed or in any way authenticated or certified to by him, nor is the certificate of Judge Pugh to that effect; nor does it show that any of the evidence was directly heard in court before him.

Error proceedings are prosecuted here from the judgment of the superior court. The matter comes before this court now (1) on a motion of defendant in error to strike the bill of exceptions

1916.]

Hamilton County.

from the files, and (2) on a motion to dismiss the petition in error.

(1) A trial before a referee proceeds as before a court, and his decision "may be excepted to and reviewed as in a trial by the court." G. C., 11479. To review the findings of the referee on the evidence it is therefore necessary to file a motion for a new trial with such referee, and upon its being overruled, to prepare and file with the referee a bill of exceptions and secure his allowance and signature thereto. *Guthrie v. Augusta Milling Co.*, 17 C. C., 257; *Woodward v. Brockell*, 21 C.C.(N.S.), 223, and cases cited.

It is contended, however, by counsel for plaintiff in error, that the referee in this case was without power because he was not appointed under G. C. 11475 by consent of the parties, but under G. C. 11476 by the court alone without the consent of the parties; that the action being for the recovery of money, was one in which plaintiff was entitled to a trial by jury, therefore the court had no power to appoint a referee without consent of parties.

The entries referring the case are as follows:

February 28, 1913:

"And upon application and consent of parties and to expedite the hearing and disposition of the cause, the case is referred to William P. Rogers, as referee to take the testimony of parties and witnesses and to receive and consider in addition thereto any depositions of non-resident witnesses that have been or may be taken by the parties in the usual form upon due notice, and upon completion of the evidence and arguments submitted, to return all the evidence so taken and received, to the court with separate findings of law and fact thereon, for final disposition by the court.

"Consent: John Bryan by Hosea & Knight, Attys."

May 10, 1913:

"The court on its own motion hereby appoints William P. Rogers as referee herein, who was duly sworn and qualified to hear testimony and report the testimony and his findings of fact and law to this court, together with all other matters and things

in question or pertaining to this cause with all convenient speed; said referee is hereby granted authority and power to compel the attendance of witnesses and the production of such documents as may be necessary to carry out the purpose of this order."

It will be observed that there is no practical difference in the orders so far as the powers or duties of the referee are concerned. The first order not only recites the consent of the parties, but also has the written consent of plaintiff. This is not in any way withdrawn, nor does the later entry revoke or cancel the former one, and as both entries were permitted to stand, it is probable that the later entry was made only for the purpose of showing the fact of the referee's acceptance and qualification. Then, too, the action as framed was one invoking the equity powers of the court, both parties praying for an accounting, and was triable to a court and not to a jury. Plaintiff made no demand for a jury and took no exception to the appointment of a referee, but appeared and proceeded to trial before him without objection.

It is also urged on behalf of plaintiff in error that while Mr. Rogers was called a referee he was in fact a special master commissioner, and that therefore it was proper in this case to take the bill of exceptions before the court instead of before the referee. The difference between the powers of a referee and a master commissioner is set out in the statute and is adverted to in the cases above cited, and is discussed by the General Term of the Superior Court in *Williams v. Stevens*, 1 C. S. C. R., 176. There is no question but that the appointment made in this case was that of a referee and not a master commissioner. This was recognized too late by counsel for plaintiff when on May 7, 1914, they filed the following motion to re-refer to the referee conditionally:

"Now comes the plaintiff and pending the consideration by the court of the motion to reject the report of the referee in this cause, and, conditional upon the overruling of said motion, in whole or in part, moves the court as follows:

"First, that, in the event of said motion to reject, being overruled in whole or in part, the court re-refer the said report to

1916.]

Harrison County.

the referee to enable the plaintiff to make a motion for a new trial before said referee and to enable the plaintiff to make exceptions and prepare a bill of exceptions and have the same signed according to law by said referee.

“*Second*, and the plaintiff asks that said referee, in the event of a motion for new trial being made, and exceptions having been taken and settled as indicated as above, return said report with said motion and bill of exceptions duly signed to this court for further action.

“(Signed) John Bryan, plaintiff, by KEIFER & KEIFER,
“HOSEA & KNIGHT,
“*His Attys.*”

The motion to strike the bill of exceptions from the files is therefore granted.

(2) The fact that this leaves no bill of exceptions before the court, however, does not authorize the court to dismiss the petition in error, and the motion to dismiss is overruled.

But the entire record, with the bill of exceptions excluded, fails to show any substantial error to the prejudice of plaintiff, and the judgment is therefore affirmed.

JONES (E. H.), P. J., and GORMAN, J., concur.

WILL CONTEST MAY BE DETERMINED BY NINE JURORS.

Court of Appeals for Harrison County.

H. L. SLEMMONS ET AL V. JULIA A. TOLAND ET AL.

Decided, April Term, 1916.

Wills—Actions to Contest Validity of—Verdict by Three-fourths or More of the Jury Sufficient—Order in Which Signatures are Affixed to a Will Not Essential.

1. Article I, Section 2, of the Constitution, and Section 11455 of the General Code, includes actions to contest the validity of a will, and a verdict in such actions may be rendered upon the concurrence of three-fourths or more of the members of the jury.
2. A will, otherwise regularly executed in conformity with the provisions of Section 10505 of the General Code, is not invalidated by the fact that one of the subscribing witnesses to the will signed

as a witness before the testator signed the will, where the signing was one continuous transaction.

Healea & Kinsey and *A. O. Barnes*, for plaintiffs in error.

P. W. Boggs, R. H. Minter and *Westenhaver, Boyd & Brooks*, contra.

POLLOCK, J.

Plaintiffs in error commenced an action against the defendants in error in the common pleas court of this county to contest the validity of the will of Elizabeth Slemmons, deceased, which will was on August 1st, 1914, duly probated in the Probate Court of Harrison County, Ohio, and an issue was made up whether of not the writing produced is the last will of Elizabeth Slemmons.

A trial was had in the court of common pleas, which resulted in a verdict sustaining the will. This action is prosecuted to reverse the judgment thereon rendered for errors which the plaintiffs claim occurred in the trial of the cause in the court below.

The court charged the jury that three-fourths or more of their number could return a verdict, and the verdict returned by the jury was concurred in by only ten of the jurors.

Article I, Section 5, of the Constitution of this state is as follows:

“The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.”

Section 11455 of the General Code, which was amended after the adoption of this provision of the Constitution in order to give effect to the Constitution, provides, in so far as it refers to this question, that:

“In all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of such jurors concurring therein.”

1916.]

Harrison County.

The plaintiffs contend that the Legislature only provided for a verdict by three-fourths of the jury in a civil action, and that the contest of a will is not a civil action but a proceeding provided by statute. That the term "civil actions" in this section embrace only such cases as were before the code known as actions at law and suits in equity. The General Code, Section 11237, defines an action as follows:

"An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense."

And Section 11238 provides that:

"There shall be but one form of action, to be known as a civil action. This requirement does not affect any substantive right or liability, legal or equitable."

Thus it appears that a "civil action" includes all ordinary proceedings involving process, pleadings, and ending in a judgment which finally determines the matter in controversy between the parties before the court.

In *Webb v. Stasel*, 80 Ohio St., 125, Shauck, Justice, said:

"It has long been familiar to counsel that the civil action of the code includes all such proceedings as prior to its enactment were regarded either as actions at law or suits in equity, and rights of action since authorized by statute unless the authorizing statute itself defines a mode of enforcing the right at variance from the procedure prescribed by the code."

We are not left to the general provisions of the code to determine the character of the proceeding to contest the validity of a will, but Section 12079 provides that a person interested in a will or codicil that has been admitted to probate may contest its validity by a civil action in the common pleas court.

The Legislature by this section of the code has provided the action by which parties interested in the distribution of an

estate, which has been disposed of by will, may contest the validity of the will in the common pleas court. We have never had any constitutional limitations on the mode of procedure in actions of this nature, but the kind of action has always been fixed by legislative enactments.

By the act of February 26, 1824, it provided that the contest of the validity of a will should be by a bill in chancery. This mode continued until the adoption of the civil code and the act of March 14, 1853, relating to the jurisdiction of the probate court, where the right to contest the validity of a will was authorized by petition to the court of common pleas of the proper county. Since that time the act above referred to has been amended, and we now have Section 12079 of the General Code, providing that the remedy may be by a civil action. The contest of the validity of a will is now a civil action, and the trial proceeds under the civil code, except where changed by the code in the chapter providing for the contest of wills, and then the trial must proceed in conformity with such special proceedings. *Dew et al v. Reid et al*, 52 Ohio St., 519.

In *Wagner v. Ziegler*, 44 Ohio St., 59, Justice Spear said:

“The statute provides the order in which the testimony shall be introduced, gives legal effect to the will and order of probate, and requires the case to be submitted to the jury. In other respects the trial is to be conducted as other jury trials are conducted; and it is the duty of the court in that case, as in other cases, to give proper instructions to the jury.”

The only special statutory provision relating to the contest of the validity of a will is the requirement in regard to the issue—that it must be made up either by pleadings or by order on the journal, the legal effect of the order of probate of the will, and the order that the testimony shall be introduced; in all other respects the trial shall proceed as other civil actions.

We find no special requirement in regard to the verdict of the jury; and the provisions of the Constitution in regard to the verdict of the jury in civil cases, and the statute enacted to carry into effect that provision, controls in actions for the contest of the validity of wills.

1916.]

Harrison County.

There was no error in the court charging the jury that a verdict should be returned by the concurrence of three-fourths or more of the jury.

The plaintiffs further claim that the trial court erred in giving defendants' request to charge before argument. The request charged is as follows:

"If you find that the paper writing purporting to be the last will and testament of Elizabeth Slemmons was signed by her in the presence of the two witnesses, S. M. Farnesworth and Catharine A. Case, and that said witnesses signed the same in the presence of the testatrix, then I charge you that as to whether the testatrix signed her name before or after the witnesses had signed their names thereto is wholly immaterial."

There was testimony tending to prove that S. M. Farnesworth, one of the witnesses to the will, signed his name to the will as a witness before Miss Slemmons, the testatrix, had signed the will; that she signed immediately after this witness; that the will was then signed by the other witness, all one continuous and uninterrupted transaction, and in the presence of each other.

The provision of the code, Section 10505, regarding the execution of wills is as follows:

"Except nuncupative wills, every last will and testament must be in writing, but may be handwritten or typewritten. Such will must be signed at the end by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge it."

In order to make a valid will the code requirements must be followed, and one of the essentials to the execution of a will is that it must be attested and subscribed in the presence of the testator by two witnesses, who either saw him subscribe or heard him acknowledge signing the will. The question then arises whether, if the witness to the will signed before the testator had signed, is it an attesting and subscribing as required by this statute?

This question first came before the English courts in a construction of Act 1, Vict., C. 26, Section 9. There it was held that it was necessary to the validity of the will that the testator sign the will before the witnesses signed. The provision of the English act was similar to the act of this state quoted above.

Some of the courts of this country have followed the decisions of the English courts, notably the New York Court of Appeals in *Jackson v. Jackson*, 39 N. Y., 153, and followed by that court in later decisions.

The Supreme Court of Massachusetts has also given a similar construction to the statute of that state in *Barnes v. Chase*, 208 Mass., 490 (94 N. E., 694).

The courts of Georgia have placed a like construction upon their statute. *Lane v. Lane*, 125 Ga., 368 (54 S. E., 90).

But the courts of many of the other states have placed a contrary construction upon the statutes of their respective states providing for the execution of a will.

“The view that seems to have the weight of modern authority is that ‘in acts substantially contemporaneous it can not be said that there is any substantial priority,’ and that where the execution is completed at one transaction it can not be held that the will is rendered invalid because one or more of the witnesses signed before the testator.” *Page on Wills*, Section 222.

The principle announced by Page has the support of the following cases: *O'Brien v. Gallagher*, 25 Conn., 229; *Gibson v. Nelson*, 181 Ill., 122 (52 N. E., 901); *Sechrest v. Edwards*, 61 Ky., 163; *Lacey v. Dobbs*, 44 Atl., 481; *Cutler v. Cutler*, 130 N. C., 1 (40 S. E., 689); *Miller v. McNiel*, 35 Pa. St., 217 (78 Am. Dec., 333); *Kaufman v. Caughman*, 49 S. C., 159 (27 S. E., 16); *In re Silva's Estate*, 145 Pac., 1015; *Horn's Estate v. Bartow*, 125 N. W., 696; *In re Shapter's Estate*, 35 Col., 575 (85 Pac., 688).

The object of requiring the execution of wills in order to render them valid to conform to a statutory formula, is to prevent fraud upon heirs at law in the distribution of the estate of their ancestors, and courts in the construction of these provisions should have this object in mind, and should not place such a

1916.]

Harrison County.

liberal construction, in order to sustain the execution, that the object of the statute would be destroyed. But when all the provisions of the statute are followed, the order in which the signatures of the testator and the witnesses are affixed to the will is not essential.

The Supreme Court of Kentucky in *Sechrest v. Edwards*, *supra*, say:

“Nor can it be material whether the names of the attesting witnesses or that of the testator should have been first subscribed, if, as in this case, the witnesses had been present when the testator * * * wrote his name, and, being called for that purpose, actually witnessed * * * the fact.”

The statute does not expressly provide the order in which the signatures of the testator and the witnesses shall be subscribed to the will; all that it requires is that the will shall be attested and subscribed in the presence of the testator. If the persons who are present are told by the testator that he desires to execute his will by signing the paper writing there present, and that he desires these persons to sign the paper as witnesses thereto, the order of signing is not essential, if the signatures of the testator and that of the witnesses are subscribed at one continuous transaction.

The chances of fraud or imposition in the execution of the will are not increased by reason of one of the witnesses signing before the testator, where the testator signs immediately thereafter, and in the presence of the witness, if the will is otherwise regularly executed.

Harsh and unnecessarily technical rules of construction should not be required in the execution of a will which may defeat the right to dispose of property by will, where the statute does not expressly imply such a requirement, and the formalities of the statute are substantially followed.

Miss Slemmons had a right to dispose of her property by will, and she should not be deprived of that right through some defect in the execution of her will, unless it is material.

Mr. Farnesworth, one of the witnesses to the will, is the only one who testified that he signed the will before the testatrix.

He says he was called into the room where Miss Slemmons was; that after some talk with her regarding her desire to execute the will, and that she desired he be one of the witnesses, he took the paper and signed it, handed it to Miss Slemmons, and she signed and handed it to the other witness, and it was signed by that witness.

Other errors were urged by plaintiffs, but we do not find that any of them are well taken, and they are not of enough importance to merit further comment here. The judgment is affirmed.

SPENCE, J., and METCALFE, J., concur.

CONSTRUCTION OF AN ILLITERATE WILL.

Court of Appeals for Knox County.

FLORENCE E. MILLER V. WILLIAM I. CLINE ET AL.

Decided, May 20, 1916.

Wills—Construction to be Adopted—Where Evidently Drawn by a Layman—Unfamiliar With Grammatical Rules or Punctuation—Most Obvious Meaning Must be Sought and Adopted.

The illiterate will involved in the instant case is construed by the court in the manner which gives to the words and sentences used the meaning which it seems most probable the testator intended to convey.

L. C. Stillwell, for plaintiff in error.

Columbus Ewalt, contra.

HOUCK, J.

This is an action praying the direction of the court in regard to the construction of the last will and testament of Hugh A. Miller, deceased.

On the 20th day of December, 1907, Hugh A. Miller, then a resident of Clay township, Knox county, Ohio, made and executed a paper writing which he intended as and for his last will

1916.]

Knox County.

and testament. On the 20th day of March, 1908, the said Hugh A. Miller departed this life, leaving no issue or other legal representatives, but leaving his widow, Florence E. Miller, surviving him. On the 6th day of April, 1908, said will was duly admitted to probate and recorded in the Probate Court of Knox County, Ohio, the same being in the words and figures following:

“First. I desire that all my just debts and funeral expenses be paid as soon as practicable after my decease.

“Second. I give and bequeath to my beloved wife all of my property both real and personal consisting of the farm on which we now reside situated in clay Township Knox county. Ohio being eighty Six acres, and one farm containing one hundred and Sixty Six acres in Harrison Township Knox county Ohio during her natural life and all the Stock house hold goods furniture provisions and other goods and chattels which may be thereon and all moneys If any at the time of my decease without making any appraisement or Sale of Such property only as my wife deems best either public or private I make a request of my wife at the time Albert. Summit. a foster boy that we are raising If he still continues of being a good boy to both of us until he is twenty one years old for my wife, Florence E Miller, to give him Two thousand dollars in money If my wife Should marry again I want all of Said property to be and to be kept in my wifes name during her life and after my wifes death, I want the property If there Should be any, I give to Albert Summit one half of what is left. and the other half to be given to the Trustees of the Baptist Church of Martinsburg Ohio, for the benifit of Said Church as they think best.

“I nominate and appoint Florence, E Miller to be the executrix of this Will, without bond.”

We are required to construe this will in order to determine the nature and extent of the estates of Florence E. Miller, the surviving widow, the Baptist Church, of Martinsburg, Ohio, and Albert Summit, the foster son of testator. It will be observed from the language and punctuation used in said will that the scrivener was not skilled in the drawing of wills, and in all such cases the aim and object of the interpreting court is and must be, if possible, to dispel the effect of some careless, incorrect or ignorant use of language or improper punctuation on

the part of the testator or his scrivener, and make the will interpret what the testator evidently meant and intended, just as though his ideas had been clearly and correctly stated and expressed therein.

The natural and literal import of the words and phrases used is presumed to have been intended, and each word is to have its effect and its usual meaning given to it, if the general intent be not thwarted thereby. Indeed, it is the duty of an interpreting court to deal lightly with errors of syntax and punctuation, where the testator did not write his own will, as in the instant case. The sole purpose of making a will is to express in written language the wishes of the testator and thereby carry out his intentions, and the only object of construction is to ascertain that intent, which must be obtained from the words used in the will. The inquiry is not, what thought did the testator wish to express by the language used, but what thought has he expressed by the words and sentences used in his will? The judicial expositor must interpret the language as it appears in the will, and therefore if the scrivener did not, by reason of lack of knowledge, inadvertence or carelessness on his part, use the language that would properly carry out the intentions of the testator in the disposition of his property, the responsibility is with the testator and not with the court, for its interpretation is based solely on the language as found in the instrument. The rule for the construction of a will in Ohio is well established, being as follows:

First. In the construction of a will the sole purpose of the court should be to ascertain and carry out the intention of the testator.

Second. Such intention must be warranted from the words contained in the will.

Third. The words contained in the will, if technical, must be taken in their technical sense, unless it appears from the context that they were used by the testator in some secondary sense.

Fourth. All parts of the will must be construed together, and effect, if possible, given to every word contained in it.

1916.]

Knox County.

Fifth. In construing a will grammatical accuracy need not be obtained, but it should be read with a view to the situation and circumstances of the testator in reference to the subjects of his disposition and the objects of his bounty.

Sixth. With these collateral aids to a correct interpretation the will must speak for itself, and the intention of the testator be gathered from what appears on its face.

While these rules are used in the interpretation of wills, yet to lay down any positive and definite rules of universal application in the interpretation of wills is impossible, for every will must stand or fall upon the language used therein and the test that is applied to it, and therefore courts are not inclined to follow rules of construction blindly, but interpret reasonably in each particular case. We feel that our theory as to the rule of construction applicable to the case at bar is fully borne out by our Supreme Court in the case of *Moon, Admr., v. Stewart et al*, 87 O. S., 357-358, where Judge Johnson, speaking for the court, says:

“It may be safely remarked that in the report of cases involving the construction of wills it is no longer necessary or profitable to discuss the various general rules which control the inquiry. They are well established, simple and familiar. Rules for construing wills are less rigid than those for construing other instruments. Where a will bears the earmarks, as in this case, of having been drawn by a layman, and not by a lawyer, the court in the endeavor to arrive at the intent of the testator will not view the language technically, but liberally, and with reference to its popular meaning. It is very rare that any two wills present precisely the same question, and therefore in construing doubtful clauses the court will ascertain the intention of the testator, as the language of such clauses may reasonably be interpreted in the particular case. It has been well said that cases on wills may well guide as to general rules of construction, but unless a case be directly in point in its essential circumstances and data, it should have little weight with the court.”

Giving to the language of the will under consideration that plain meaning that the words and sentences therein must certainly convey, and applying thereto the rules of interpretation

as herein laid down, we can arrive at but one conclusion, and that is that the testator intended to dispose of his property as follows:

First. To Florence E. Miller, his surviving widow, a life estate in all of the real estate described in his will.

Second. To Florence E. Miller, his surviving widow, all of his personal property, including moneys, absolutely; subject, however, to the payment of his funeral expenses and just debts, if any.

Third. Under the terms and provisions of said will, Albert Summit is entitled to a legacy of two thousand dollars, providing he complies with the conditions imposed upon him in said will, the same to be a lien on the real estate described in the will, subject, however, to the life estate of Florence E. Miller, surviving widow of Hugh A. Miller, the testator.

Fourth. After the death of the widow, Florence E. Miller, and the payment of the legacy of two thousand dollars to Albert Summit, provided he complies with the conditions imposed upon him with reference to the said legacy, the one-half of said real estate described in said will shall go to and vest in the said Albert Summit, and one-half shall go to and vest in the Baptist Church, located at Martinsburg, Ohio.

Judgment and decree accordingly.

SHIELDS, J., and POWELL, J., concur.

1916.]

Hamilton County.

INEFFECTUAL EFFORT TO FILE A BILL OF EXCEPTIONS.

Court of Appeals for Hamilton County.

THE D. T. WILLIAMS VALVE COMPANY, ROBERT E. MULLANE
AND FRANK X. PUND V. DAVID T. WILLIAMS.*

Decided, May 8, 1916.

Leaving a Bill of Exceptions with an Unauthorized Clerk—Not a "Filing" of the Bill—Inadequate Grounds for Appointment of a Receiver.

1. The leaving of a bill of exceptions with some deputy in the employ of the clerk of courts not authorized to receive it, with instructions to said deputy to place it on file, does not amount to a filing of the bill, and a motion to require the clerk to stamp the bill as "filed" does not lie where not made until subsequent to the statutory time for the filing of a bill.
2. It is error to grant a prayer for appointment of a receiver where the appointment appears to be an end in itself, and is not ancillary to other and ultimate relief within the provisions of Sections 11894 and 11398, General Code.

Frank H. Kunkel and Pogue, Hoffheimer & Pogue, for plaintiffs in error.

Nelson B. Cramer and Charles W. Baker, contra.

JONES (E. H.), P. J.

This is a proceeding in error brought to reverse an order of the Insolvency Court of Hamilton County appointing a receiver for plaintiff, the D. T. Williams Valve Company, a corporation.

The appointment was made by the court below *pendente lite*, upon a motion for a receiver filed on September 18, 1915, contemporaneously with the amended petition upon which the action is based. Upon the day the cause was set for hearing in this court a motion was filed by the defendant in error to affirm

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court June 6, 1916.

the judgment and dismiss the petition in error, for the reason that no bill of exceptions had been filed and that the time within which same might be filed had expired. This was followed by a motion of plaintiffs in error asking the court to order the clerk to stamp the bill of exceptions as "filed" in the court of appeals. This latter motion was based upon the claim made by counsel that the bill of exceptions had been left in the hands of one of the deputies of the clerk of the courts, on duty in the insolvency court room, with instructions to have the same filed. It is claimed that this was in effect a filing of the bill of exceptions; that the stamping on the same was a ministerial duty only and it having been neglected the rights of plaintiffs in error could not be jeopardized thereby.

We find that this latter motion is not well taken. It does not appear from the evidence that the matters and things claimed by counsel for plaintiffs in error, admitting same to be true, amount to a filing of a bill of exceptions. The usual manner of filing papers is by taking them to the clerk's office and there handing them to the clerk or one of his deputies. To grant this motion would be in effect to hold that it is only necessary to hand a paper or pleading or bill of exceptions to some one of the many deputies, stationed in the different court rooms, in order to make the filing complete. This would be an impractical and altogether dangerous rule to establish.

As already announced from the bench, the motion to affirm filed by defendant in error must be overruled, as the petition in error contains assignments of error not based upon the bill of exceptions. We refer especially to the first three grounds of error, which are as follows:

"1. That said court erred in overruling the demurrer of the D. T. Williams Valve Company, plaintiff in error.

"2. That said court erred in holding that it had jurisdiction to appoint a receiver upon the motion of defendant in error.

"3. That said court erred in holding that the facts set out in the petition in said cause were insufficient in law to justify the judgment and order appointing a receiver for the D. T. Williams Valve Company."

1916.]

Hamilton County.

These alleged errors we may pass upon without resorting to the bill of exceptions. And upon consideration we find that they are well sustained by the pleadings, journal entry of the court appointing the receiver, statutory provisions and several well-considered Ohio cases.

From an examination of the original and amended petition herein it seems clear that the pleader was seeking principally and primarily the appointment of a receiver for this concern. In each instance the prayer begins thus: "Wherefore plaintiff prays that a receiver be appointed," etc. There is no authority in our statute for the appointment of a receiver except in a proceeding where some other relief is sought and as ancillary to such proceeding and incidental to the relief therein sought. A careful reading of the amended petition in this case must convince any one that there is no foundation laid, nor are there any facts stated which would justify any court in finding that it is desirable, necessary or advisable to dissolve this corporation and wind up its affairs.

It is true that the petitioner predicts dire things which are going to happen to this corporation if its present management is permitted to remain in charge of its affairs, but these statements are not predicated upon allegations of indebtedness, insolvency or inability to meet its obligations which if proven would warrant a court in taking charge of or discontinuing the business of said corporation.

Mr. Williams, the plaintiff below, is a large stockholder, but he is the only one of the stockholders complaining in this action. Nearly all of the remaining stockholders, representing the majority of the stock, and many of the largest creditors of the concern have voluntarily appeared in this action to resist the prayer of the petition and of the amended petition, they having filed in the court below intervening petitions in which they pray for a dismissal of the amended petition and a denial of the relief sought therein.

The entry of the court below appointing a receiver is in the form of a finding of facts and of law separately stated. As its finding of fact the court says:

“that certain litigations concerning which orders hereafter will be made, should be begun by and on behalf of the defendant corporation in order to conserve and protect its interests; that there has not been a proper management and conduct of the business of said corporation; that there is danger of the assets and property of said corporation being lost, wasted and dissipated, and there is likewise danger of its business being injured, depressed or diminished because of want of proper care, control and management; and all of this pending the determination of important questions of vital interests to the existence and welfare of the corporation and of its stockholders, minority as well as majority, to be determined on the final hearing of this cause, as well as determined in suits which may hereafter be ordered to be brought by the receiver in the interest and in behalf of the said corporation, and all of its stockholders, unless the matters pertaining thereto are settled and adjusted without suits or litigation; and that an injunction or injunctions issued by this court now would not be of any avail in protecting the property and the rights of the corporation and of the stockholders.”
* * *

Following this the court proceeds to grant the motion for a receiver *pendente lite*, naming Mr. Philip O. Geier as such receiver, and defining his duties. It must be presumed that the finding of the court that “there is danger of the assets and property of the said corporation being lost, wasted and dissipated, and there is likewise danger of its business being injured, depressed and diminished because of want of proper care, control and management” is based upon evidence offered in support of the allegations of the amended petition. These allegations have reference to certain transactions of the corporation through its officers, chief among which are the purchase of an automobile and accessories therefor for personal use, and the issuance of a certificate of one hundred and fifty shares of stock to one D. M. Forker, which certificate was pledged with the Sharon Savings & Trust Company as security for a loan of \$15,000, which sum was loaned to and used by the corporation, and the obligation to the bank assumed by it.

Assuming that all these allegations were fully and unqualifiedly proven, we are of the opinion that such a showing would

1916.]

Hamilton County.

not warrant the finding that there was danger of the assets and property of the said corporation being lost, wasted and dissipated, and the other dire things contained in the finding and decree of the court below. The allegations of the amended petition, in other words, are not sufficient to constitute a cause of action for a dissolution of this corporation, the sale of its assets, the closing up of its business and distribution of the proceeds among the stockholders.

As above stated, we do not understand from a reading of the petition and the amended petition that such a result is really contemplated or sought by the plaintiff in instituting this proceeding. Nor does it appear from the entry of the court below that in making the temporary appointment of a receiver the court had determined that it was necessary or in the interest of the stockholders to so dissolve the corporation and terminate its business. There is no authority in the statute or elsewhere in the law for the appointment of a receiver *pendente lite* as made by the court below, with the powers and duties with which this receiver was entrusted. In order to appoint a receiver, either permanently or *pendente lite*, there must be first a finding by the court that the case is one in which under the statute a receiver may be appointed. In an action against a corporation before a receiver can be appointed the case must fall within the provisions of Sections 11894 or 11398, General Code. Courts will not and should not appoint a receiver unless in a proper action for other and ultimate relief the appointment of such receiver is necessary and ancillary to the main and ultimate relief sought. The naming of a receiver is not regarded as an end in itself, but only as a means to better secure a necessary and ultimate end.

In support of this view we will refer, without quoting therefrom, to the case of *Cincinnati, Hamilton & Dayton Railroad Company v. George K. Duckworth*, 2 C. C., 518; also to a decision of this court of appeals in *Wiedemann Brewing Co. v. Herman*, 20 C.C.(N.S.), 187; also, *Callahan v. Ice Co.*, 13 C. C., 479; 34 Cyc., 29; *Cherry v. Maumee Cycle Co.*, 64 O. S., 214; *C., S. & C. R. R. Co. v. Sloan*, 31 O. S., 1.

The amended petition below not having stated a cause of action, the demurrers to it should have been sustained, and for error in not sustaining the same the judgment of the court below will be reversed.

We are further of the opinion, inasmuch as the entry of the court below purports to be and is in effect a finding of fact upon which the conclusions of law are based, concluding with the naming of a receiver, that the judgment of the court below is contrary to law, as is made evident by such finding and decree.

Judgment reversed and cause remanded.

JONES (Oliver B.), J., and GORMAN, J., concur.

**RESTORATION OF LIEN UNDER A MORTGAGE
INADVERTENTLY RELEASED.**

Court of Appeals for Stark County.

DANIEL MOSSOP V. J. W. BIDWELL ET AL.

Decided, January Term, 1916.

Mortgage—Transferred as Collateral Security—And Inadvertently Released by the Transferee—Notation of Release on Mortgage Record Canceled and Lien of the Mortgage Restored—Notice as to Limited Transfers.

Where the transfer of a mortgage, which is being used as collateral security, is not absolute on its face, but is of such a character as to clearly show it is a limited transfer, sufficient notice is afforded to one examining the title to the premises described in the mortgage that the transferee is not the absolute owner and has no right to release it of record, and a notation on the mortgage record, placed there by the mortgagee and inadvertently made in the form of a full release, should be stricken therefrom and the precedence of the lien originally attaching to such mortgage fully restored.

Amerman & Mills, for plaintiff.

C. C. Upham and Floyd & Yutzey, contra.

1916.]

Stark County.

HOUCK, J.

This cause is here on appeal from the common pleas court of this county. The plaintiff claims in his amended petition that J. W. Bidwell and his wife, Ida Bidwell, are indebted to him in a sum amounting to about \$2,150, with interest, due to him on a mortgage note of \$3,900, the said note and mortgage bearing the date of September 1, 1909; that said mortgage was duly filed for record in the recorder's office of Stark county, Ohio, on the 3d day of September, 1909, and that said mortgage is the first and best lien on the real estate described therein. That on the 22d day of November, 1910, he assigned said mortgage as per the terms of a written contract as collateral security to the Stark-Tuscarawas Breweries Company, a corporation; that afterwards, on the 19th day of July, 1912, he paid and fully discharged all his indebtedness to said breweries company, and while said mortgage was in full force and effect as between him and the mortgagees, the said breweries company, by mistake on its part and without the knowledge of plaintiff, placed a notation on the mortgage record of said mortgage in the recorder's office of Stark county, Ohio, which he claims was only intended as a release of said assignment of said mortgage as collateral security to said breweries company, but by inadvertence and unintentionally the said breweries company placed the usual notation of a full release thereon. Plaintiff further asks that certain mortgages on said premises, one of \$835, bearing date of May 14th, 1912, and one for \$1,801, bearing date of September 30th, 1913, held by the Superintendent of State Banks of Ohio be declared inferior and subsequent to his said mortgage lien, and in fact prays that they be canceled and held for naught.

The defendant, the Superintendent of Banks of the State of Ohio, by answer denies all of the material allegations in the amended petition of plaintiff, and especially avers that by reason of the notation made on the margin of the record in said mortgage record containing the recording of said plaintiff's mortgage by the said breweries company that the same was released of record, and that by reason thereof the mortgages heretofore mentioned of said Superintendent of Banks of the State

of Ohio are the first and best liens on the real estate described therein, and further that the said pretended lien of plaintiff on his alleged mortgage is and has no force and effect in law.

The only issue in this case, as we view it, is as to the legal effect of the transfer and notation thereon of the Daniel Mossop mortgage, in the light of the facts as shown by the evidence and the law applicable thereto, the notation on the mortgage record being as follows:

“CANTON, OHIO, Nov. 22, 1910.

“For a good and valuable consideration I hereby sell, assign, convey and transfer all of my right, title and interest to the within note and mortgage to the Stark-Tuscarawas Breweries Company, a corporation, per the terms and conditions of a contract of even date herewith, by and between the parties hereto.

“DANIEL MOSSOP.

“Copied from original
mtg. Nov. 22, 1910.

“M. E. McFarren, Recorder, by G.”

“CANTON, OHIO, July 19, 1912.

“This is to certify that the conditions of this mortgage have been satisfied.

“THE STARK-TUSCARAWAS BREWERIES CO.

“By JOHN F. WEISS, *Sec'y & Treas.*

“W. E. McFarren, Recorder. Copied from
original mtg. 7-9-12.”

From an examination of the language contained in the above transfer it will readily be seen that it is a conditional or limited transfer, and is not absolute and entire. In other words, the transfer is in extent and scope limited (using the language there) “per the terms and conditions of a certain contract of even date herewith by and between the parties hereto” (referring to the plaintiff and the breweries company). The only right the breweries company had in and to the mortgage was that given to it by the transfer, and when it attempted to release it, whether inadvertently or otherwise, it did so without any authority in fact or in law as between the rights of the mortgagors and mortgagee. We think the language in the transfer is of such a character and nature, and not being absolute on

1916.]

Stark County.

its face, but being a limited transfer, which is clearly patent by the language contained therein, is sufficient notice to persons examining the title of the premises described in said mortgage to know that the transferee of same is not the absolute owner thereof, and has no right to release it of record. The evidence in this case clearly shows, and in fact it is undisputed that the representative and agent of the Superintendent of State Banks who examined this title made no inquiry as to any contract, and made no examination as to whether or not the same was of record, although at this time the contract referred to in said transfer was of record and could have been found in Vol. 482, page 153, of the mortgage records of Stark county, Ohio. An examination of the contract would have disclosed the fact that the breweries company was not the owner of the mortgage in question, and was without authority to release the same.

We think it is a well settled principle of law that whenever a party has information or knowledge of certain extraneous facts which of themselves do not amount to nor tend to show actual notice, but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim or right, and the circumstances are such that the inquiry if made and followed up with reasonable care and diligence would lead to a discovery of the truth, and a knowledge of the interest, claim or right which really exists, the party is absolutely charged with a constructive notice of such interest, claim or right, and the presumption of knowledge is then conclusive.

In view of what we have already said we think that the law and equities are in favor of the plaintiff, and that he is entitled to the relief prayed for in his petition, and that said notation on the mortgage record, placed there by the said breweries company, should be stricken therefrom and held for naught, and that judgment be entered in favor of the plaintiff on his note, with interest, and said real estate described in the amended petition be sold, and the proceeds first applied to the judgment of plaintiff.

Judgment and decree accordingly.

SHIELDS, J., and POWELL, J., concur.

**PROOF OF NOTICE TO CITY OF DANGEROUS CONDITION
IN STREET.**

Court of Appeals for Hamilton County.

ETTA M. DIETZ v. THE CITY OF CINCINNATI.*

Decided, February 28, 1916.

Charge of Court—As to Evidence of Constructive Notice—Previous Accident at the Same Place and from the Same Cause—Competent as Tending to Show Knowledge of the Municipality of the Existence of a Dangerous Condition.

In an action against a municipality for injuries from falling into a manhole alleged to have been covered with a lid which tilted when stepped upon, it is prejudicial error to charge the jury that evidence to the effect that other persons had fallen into the same hole, previous to the accident to plaintiff, could not be considered for the purpose of showing constructive notice to the city of the defective and dangerous condition of said lid.

Thos. L. Michie, James J. McCartin and H. P. Karch, for plaintiff in error.

Walter M. Schoenle, City Solicitor; Saul Zielonka, Assistant City Solicitor, contra.

GORMAN, J.

Plaintiff in error brought an action against the defendant in error in the Superior Court of Cincinnati to recover damages for personal injuries claimed to have been sustained by her by the turning of an iron lid or covering on the manhole of a sewer inlet on the sidewalk on Watson street in the city of Cincinnati. She claimed that in walking along the sidewalk she stepped on the side of this iron covering, and by reason of the same being defective and worn it turned under her foot, causing her to be thrown into the manhole, resulting in serious injuries. A verdict was returned for defendant and judgment was entered

*Motion to require the Court of Appeals to certify its record overruled by the Supreme Court, May 22, 1916.

1916.]

Hamilton County.

thereon, and error is prosecuted to this court to reverse the judgment.

The bill of exceptions before us does not purport to contain all the evidence, but is in the short, narrative form. It recites that the evidence tended to show that on two different occasions before the date of the fall suffered by the plaintiff, to-wit, December, 1911, and four years prior to the trial, other persons had stepped upon the said lid, and it had turned and caused them to fall, and that said lid and sewer inlet were in practically and substantially the same condition when the plaintiff fell as the lid had been at the different times when it had tilted, on former occasions and caused other persons to fall when it was stepped upon.

. Objection is made to the general charge of the court with reference to this evidence. The language of the court referred to is as follows:

“There was certain evidence in this case tending to show that other persons had fallen through this sewer top, and the time of such incidents was given in the testimony of certain witnesses. I will say to you that the fact, if fact it be, that certain persons had fallen at prior dates does not tend to show notice to the city of Cincinnati of a condition of defect, or of any condition at that time. This evidence you will take as bearing only upon the question of whether or not, if you find the defect to have existed at the time of plaintiff's accident, such defect did actually exist at these prior times. In other words, the testimony, to which I refer bears not upon notice to the city, but bears, as I say, upon the condition of the sewer top and the length of time for which such condition existed.”

A general exception was taken to the charge of the court, and the sole ground of error complained of is that that part of the general charge above set out was prejudicial to the plaintiff in error, and requires a reversal by this court of the judgment below.

In the case of *Village of Ashtabula v. Bartram*, 3 C. C., 640, it is held that:

“Testimony that other vehicles and persons had been precipitated down the hill, at the point in question, at other and

prior times, and when the fence was in the same condition substantially as when the accident to the plaintiff occurred, is, in such case, admissible to prove the dangerous character of the place for want of such barrier, and knowledge thereof by the defendant; but not to prove negligence on the part of the defendant, nor care and prudence on the part of the plaintiff."

In *Brooklyn Street Ry. Co. v. Kelley*, 6 C. C., 155, it was held:

"It is proper to show that other cars had left defendant's track at or about the place where the accident complained of occurred, for the purpose of showing notice to defendant of the liability of cars to leave the track at that point, and also of showing the dangerous condition of the track at that point."

In *City of Circleville v. Sohn*, 20 C. C., 368, it was held:

"In an action against a municipal corporation to recover damages for an injury alleged to have been caused by slipping and falling at an alley crossing, and evidence having been offered tending to show that the alley crossing had been substantially in the same condition for a number of years, and that during that time divers persons had slipped or fallen at that point, the court should at the time said testimony is received, then instruct the jury that such testimony can only be used by them for two purposes: first, as tending to show the defective condition of the alley crossing, at the point where the plaintiff claimed to have received her injury; and, second, as tending to show that the city authorities had knowledge or should be charged with knowledge of such defective condition."

The same rule is laid down in *Brewing Co. v. Bauer*, 50 O. S., 560, where the court says:

"Such evidence is only competent to prove the defective character of the machine, and the employer's knowledge of the fact."

The same rule is laid down in the following cases: *Evans v. Erie R. R. Co.*, 213 Fed., 133 (a decision of the U. S. Circuit Ct. of App. of this Dist.); *Dist. Columbia v. Armes*, 107 U. S., 519; *Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed., 665; *Patton v. Southern Ry. Co.*, 82 Fed., 979.

1916.]

Mahoning County.

It would appear that the trial court erred in limiting the evidence above referred to, to show the condition of the manhole top at the times when other persons claimed to have fallen at this place, and specifically charging the jury that they could not consider this evidence for the purpose of showing knowledge on the part of the city authorities.

We are further of the opinion that this error was so prejudicial to the plaintiff, who was endeavoring to establish constructive notice to the city, that the judgment should be reversed and the cause remanded for a new trial.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

TIME WITHIN WHICH SUIT MAY BE BROUGHT.

Court of Appeals for Mahoning County.

JOSEPH CORTESI ET AL V. FIREMEN'S FUND INSURANCE COMPANY.*

Decided, October Term, 1915.

Action on Policy of Fire Insurance—Dismissed Otherwise than on its Merits—New Action Not Barred—By Lapse of More than One Year After Occurrence of the Fire—Section 11233.

A clause which shortens the statute of limitations, as to the time for bringing suit on the contract in which said contract is incorporated, can not be enforced in the face of the provision of Section 11233, having reference to the time within which suit may be brought in cases which have failed otherwise than on the merits.

D. J. Hartwell and E. H. Moore, for plaintiffs in error.

J. W. Mooney, contra.

Houck, J. (of the Fifth Appellate District, sitting in place of Spence, J.).

This is an action in this court on error to the judgment of the Common Pleas Court of Mahoning County, Ohio.

*Motion to require the Court of Appeals to certify its record in this case overruled, May 23, 1916.

The original action arose out of a policy of insurance issued by the Firemen's Fund Insurance Company on the property of the plaintiffs in error, the policy covering a building located in the city of Youngstown, Ohio, and in an amount not to exceed \$1,200.

The petition contained two causes of action: the first seeking a reformation of the contract of insurance, and the second praying for a judgment on the reformed contract for the sum of \$1,200.

The cause was heard, and the contract of insurance was reformed, as prayed for in the petition. Thereafter the cause came on for trial on the second cause of action, and the same was dismissed by the court for want of prosecution.

Thereafter, and within one year after the dismissal of the second cause of action, as aforesaid, but not within twelve months next after the fire, the plaintiffs in error filed their petition in the common pleas court, alleging therein that by a decree of said court the contract of insurance had been reformed; the loss by fire of the building; the failure otherwise than upon its merits of the second cause of action in the former suit; a full compliance with all the terms and conditions of said policy, and prayed for judgment against the defendant for the sum of \$1,200.

The defendant filed its answer to said petition, alleging, among other things, that said policy of insurance contained the following provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance, by the insured, with all the foregoing requirements, nor unless commenced within twelve months after the fire."

The cause was submitted to a jury, and after the plaintiffs had submitted their evidence the defendant moved the court to direct the jury to return a verdict for the defendant, upon the ground that the evidence disclosed the fact that the suit at bar had not been brought within twelve months after the fire; and thereupon the court sustained the motion, and the jury returned its

1916.]

Mahoning County.

verdict for the defendant. A motion for a new trial was filed, heard, and overruled, and judgment was entered on the verdict.

Error is prosecuted to this court seeking a reversal of the judgment of the court below for sustaining the motion for a directed verdict, and in overruling plaintiffs' motion for a new trial.

The question presented for determination is, Does the stipulation in the policy of insurance that "suit must be commenced within twelve months after the fire" abrogate and set aside the provisions of Section 11233 of the General Code, which provides:

"In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date." * * *

The stipulation in the policy that no suit could be maintained to recover on the policy, unless brought within twelve months after the fire, was intended to shorten the statute of limitations with reference to the time of bringing the action; but how can it be properly claimed, or the contention of defendant in error sustained by any reasonable principle of law or justice, in the face of the provisions of Section 11233 of the General Code? Such a contract between the parties could not in any way abrogate, set aside and hold for naught the provisions of said section, stating as to when actions may be commenced unless they have been determined upon their merits.

The action at bar was not determined upon its merits in the former suit, and after the dismissal of the former suit a new action was brought—the one at bar—within the year, and we think properly so. The plaintiffs never had their "day in court" until the filing of the action and its trial in the present case.

The stipulation in the contract that "no action could be maintained on the policy unless commenced within twelve months

after the fire," in no way waived or abrogated the rights of plaintiffs under Section 11233 of the General Code. When the parties herein entered into the stipulation or agreement contained in the policy they must have, or at least should have, considered it in the light of the provisions of said statute. It is presumed they knew the law, and that it was their intention to make their contract in conformity thereto, and if they did not do so, the defendant in error can not now complain because it was in violation of and not in conformity with the provisions of the general statute governing the same. A contract for a shorter limitation does not control in face of the general statute, which must govern in such cases.

We have made a careful examination of the authorities cited by counsel in this case, and have examined many other authorities and decisions of courts not only in our own, but other states, bearing on the proposition before us, and we feel that the rule herein laid down is applicable to the case at bar. The case of *Railway Company v. Bemis*, 64 Ohio State, page 26, while not directly in point, was a material aid to us in arriving at our conclusion.

A majority of the court is of the opinion that the judgment of the common pleas court should be reversed. Judgment reversed, and cause remanded to the common pleas court for a new trial.

METCALFE, J., concurs; POLLOCK, J., dissents.

1916.]

Hamilton County.

STREET RAILWAY'S SHARE OF A GRADE ELIMINATION.

Court of Appeals for Hamilton County.

THE CITY OF CINCINNATI, BY ALFRED BETTMAN, ITS SOLICITOR,
V. THE CINCINNATI TRACTION COMPANY AND THE CIN-
CINNATI STREET RAILWAY COMPANY.

Decided, July 6, 1916.

Grade Crossings—Division of the Expense of Elimination—Street Railway Company Not a Necessary Party—Where Agreement for Elimination is Entered Into—Between Municipality and Steam Railroad Company—Liability of Street Railway for Part of the Cost—Not Affected by Change in Location of Street—Reasonableness of the Change and of the Cost Assessed Against the Street Railway Company.

1. The authority vested in municipalities for the elimination of grade crossings is a police power which is continuing in its nature and is in no way limited by the franchise of a traction company whose tracks occupy the street.
2. A municipality in contracting with a steam railway company for the elimination of a grade crossing is not bound to make the traction company occupying the street a party thereto, but may proceed with the improvement without notice to such company.
3. A street railway franchise in the street in no way limits the right of the municipality to change either the grade or the location of the street as the public necessity or convenience may require, particularly where the reasonableness of the change is not questioned, and the traction company must adapt its tracks to the changes so made.
4. The grade crossing in the instant case was eliminated by the building of a viaduct. Sixty-five per cent. of the cost was paid by the steam road and thirty-five per cent. by the city. The city then obtained a judgment, based upon a verdict, against the traction company occupying the street for its share of the cost of the improvement, which was fixed at \$61,220.09, which was something less than one-half of the share paid by the city. *Held:*

That in view of the evidence and all the circumstances surrounding the improvement and the benefit to and the saving which it will effect for the traction company, the proportion of the cost which it is asked to pay is reasonable, and a judgment is awarded similar to that entered in the lower court.

Walter M. Schoenle, Solicitor, and *Constant Southworth*, Assistant Solicitor, for plaintiff.

Joseph Wilby and *Ellis G. Kinkead*, contra.

JONES (Oliver B.), J.

This action was brought by the city of Cincinnati to compel the Cincinnati Traction Company and the Cincinnati Street Railway Company to pay to the city their share of the expense incurred in the elimination of the grade crossing of Ludlow avenue and the Baltimore & Ohio Southwestern Railroad, and to have the judgment for such share of said expense declared to be a lien on the property of said companies.

Under the provisions of Sections 8874 to 8894, inclusive, of the General Code, the city of Cincinnati in conjunction with the Baltimore & Ohio Southwestern Railroad Company provided for the elimination of the grade crossing of Ludlow avenue over the tracks of the steam railroad company. In so doing a bridge or viaduct was constructed from a point on Ludlow avenue southeast of the Miami canal, running in a direct line to Spring Grove avenue at the same place that the former line of Ludlow avenue intersected it, and that part of the old line of Ludlow avenue included between the north and south lines of the right-of-way of the Baltimore & Ohio Southwestern Railroad was vacated and the grade crossing entirely eliminated, all of the through travel over Ludlow avenue going above said railroad tracks on the new Ludlow avenue viaduct, including the street railway travel of the defendant company.

The Cincinnati Street Railway Company is the owner of the street railway tracks and franchise, and has leased same to the Cincinnati Traction Company which is operating them. Previous to the elimination of said grade crossing, a double track road was operated over that part of Ludlow avenue lying west of the point where the east end of the Ludlow avenue viaduct was constructed and across the Baltimore & Ohio Southwestern railroad track on grade. After the vacation of said grade crossing, such operation did not continue, but instead the line was operated over the new viaduct.

1916.]

Hamilton County.

The total cost of the viaduct so constructed was \$354,023.63. Sixty-five per cent. of the cost was paid by the Baltimore & Ohio Southwestern Railroad Company as provided by statute. The city paid thirty-five per cent., amounting to \$126,692.13, and by ordinance required said street railway and traction companies to bear one-half of the portion payable by it as their reasonable proportion of the cost assumed by said city. Each of the defendants denies the right of the city to collect any part of said cost, and in the event that any part should be so chargeable to either of said companies insists that the amount sought to be recovered in this case is excessive and above the amount properly chargeable against them.

The case was tried to a jury in the court of common pleas, and resulted in a judgment against the Cincinnati Traction Company in the sum of \$61,220.09, with interest at six per cent. from April 5, 1915; which judgment was declared to be a lien on all the property, real and personal, of the defendant the Cincinnati Street Railway Company.

The Cincinnati Street Railway Company took an appeal from said judgment; and error proceedings were also prosecuted by both companies, to secure a reversal of said judgment. The cause was heard in this court on the appeal of the Cincinnati Street Railway Company.

Numerous questions were raised in the oral arguments and briefs of both parties. The main questions were all considered and disposed of in the case of *Northern Ohio Traction & Light Company v. City of Akron*, in which the opinion of the court of appeals appears in 23 C.C.(N.S.), 497, where Sections 8892, 8893 and 8894 were held to be constitutional. This decision was affirmed by the Supreme Court in a journal entry found in 91 O. S., 382. In that case it was held that the amount fixed by an ordinance of a city, as the proper amount to be paid by a street railway existing in a street where a grade has been eliminated, was a proper basis upon which to institute an action in court, but that the recovery to be had by the city against said street railway for such share of expense should be for such amount as the jury should determine to be a reasonable portion of the cost of the

improvement. And in that case the amount fixed by the jury in its verdict, for which judgment was rendered and upheld by the Supreme Court, was less than the amount claimed by the city and fixed by its ordinance.

The proceedings in this case have been had along the same lines as those in the Akron case, the only difference being that in the instant case two companies are interested in the street railway, one as lessor and the other as lessee, the lessee being bound by the terms of its lease to pay all obligations arising similar to the claim here under consideration; and the lessor company being interested only to the extent of the lien upon its property in the event of the failure of the lessee company to pay any judgment obtained for such expense.

The power authorized to be exercised by a municipality in the elimination of a street grade crossing over a steam railroad, under the sections above referred to, is an exercise of the police power, which is a power continuing in its nature and not in any way limited by the extent of the grant or franchise. *Gas Light & Coke Co. v. Columbus*, 50 O. S., 65; *Wabash R. R. Co. v. Defiance*, 52 O. S., 262.

In *Missouri Pacific Ry. v. Omaha*, 235 U. S., 121, it was held by the Supreme Court:

"A railway company may be required by the state, or by a municipality acting under the authority of the state, to construct overhead crossings or viaducts over its tracks at its own expense; the consequent expense is *damnum absque injuria* or compensated by the public benefit in which the company shares and is not a taking of property without due process of law." (Syl. 1.)

"In the exercise of the *police power* the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with private rights." (Syl. 2.)

And in this case the court in its opinion at page 129 said, in regard to the matter of charging part of the expense to the street railway occupying such street:

1916.]

Hamilton County.

“It may be that it would be more fair and equitable to require the street railway to share in the expense of the viaduct, and if the municipality had been authorized so to do by competent authority, it would have been a constitutional exercise of the police power to have such division of expenses.”

And in the case of *Chicago & Alton R. R. Co. v. Transbarger*, 238 U. S., 67, the court upheld a statute requiring the owners of a railroad to provide means for passing water under their railway embankment long after it had been constructed, as a matter of police regulation.

Nor was it necessary in arranging for this improvement that the street railway company or the traction company should be notified of the proceedings or that either should become a party to the contract between the city and the steam railroad company.

In *C., B. & Q. R. R. Co. v. Nebraska*, 170 U. S., 57, the court says, page 76:

“In *State v. Missouri Pacific Ry.*, 33 Kan., 176, the power of the city of Atchison to compel the respondent to construct viaducts was sustained under legislation similar to that herein involved and, referring to the subject of notice, the court, per Judge Valentine, said: ‘We do not think it is necessary that the city should have given the railroad companies notice before passing the ordinance requiring them to construct the viaduct. Notice afterward, with the opportunity on the part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct is sufficient.’”

And on page 77:

“So, in the present case, while no notice may have been given to the railroad company of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.”

The rights of the street railway company are to the use of the street, and the fact that they enjoy such a franchise in no

way limits the rights of a municipality to either change the grade of that street or to alter its course or location as public necessity may require, and it becomes the duty of the street railway company to adapt its tracks and location to such requirement of the city. And so far as the amount to be paid by it is considered, that is to be fixed not as a matter of determination by the city by ordinance, but as a matter of adjudication by the court subject to the legislative restrictions that have been provided.

There is no question as to the right of the city to change the location of Ludlow avenue in making this improvement. Such power is expressly conferred by the terms of Section 8875, General Code. The only portion of Ludlow avenue which has been entirely vacated is the part lying between the north and the south lines of the right-of-way of the B. & O. S. W. railroad—that is, the crossing itself, within the lines of the railroad right-of-way. The other two parts of Ludlow avenue as it previously existed still remain public streets being each a cul-de-sac running from either terminus of the new viaduct to the line of the railroad. But because of the vacated portion at the crossing it becomes an impossibility to cross the railroad on Ludlow avenue at grade. The street railway, therefore, being unable to continue the use of its franchise over that crossing, was compelled by reason of the change in the lines of Ludlow avenue by the construction of the viaduct, to transfer its track and operation from the old to the new line of Ludlow avenue between the termini of the viaduct. In other words, the effect is the same as though the entire old portion of the avenue between those termini had been vacated, so far as continuous passage is concerned.

There is no question but that if a street is straightened, as was done by the construction of this viaduct, or if its location is changed by a detour or shifting of its lines to either side of its old lines, that the street railway could claim a right under its franchise to occupy and use the new lines of the street; and such would be the case in this instance regardless of the stipulation made between the parties that the use and occupation of the viaduct should in no way prejudice their rights in this case. And

1916.]

Hamilton County.

while upon this subject, it might be said that the admission of evidence as to the amount of travel over the viaduct is not regarded as an infraction of this stipulation.

Defendants however have undertaken to argue that this case does not come within the strict literal terms of Section 8892, for the reason that Section 12 of the ordinance recites "that the company operating the street railroad *over the present intersection* shall pay a portion of the city's expense to be hereinafter fixed by ordinance," and that the ordinance which fixes that portion, in the third paragraph of its preamble, states that "Whereas the tracks of the Cincinnati Traction Company, a corporation under the laws of Ohio, *cross the right-of-way of said railroad company at a point where under the plans and specifications it has been determined to construct such improvement.*" They argue that because the old crossing at grade is some two hundred and fifty feet further east than the location of the viaduct where the new crossing passes above grade, the "point" of crossing can not be identical in the new and in the old, and therefore that Section 8892 does not apply. Such argument is clearly without merit. The same argument might be made as to any sub-grade or overhead crossing because the place of crossing, even though the lines of the street or the lines of the viaduct or subway were identical now with those of the old, the actual tracks would be either many feet above or below the point of the old crossing.

No question is raised in this case as to the reasonableness of the change in location. In fact it is shown by the record that the change is a great benefit both to the traveling public and to the defendants, and that the expense is greatly reduced by the straightening in the line of Ludlow avenue by means of the new viaduct, which forms practically the hypotenuse of a triangle of which the old lines of Ludlow avenue form the other two sides.

The power to so change a highway in separating grades in the crossing of a railway and a highway is well illustrated in the case of *Davis v. Village of Hampshire*, 153 Mass., 218; and an interesting nisi prius decision upon this proposition is found in the case of *Stoner v. P., C., C. & St. L. Ry. Co.*, 9 N.P.(N.S.), 337,

in which a railroad subway crossing was substituted for two railway crossings, being 990 feet away from one and 772 feet from the other.

Defendants, however, insist that the charge as fixed by the judgment below is excessive and far beyond any reasonable charge that should be asserted against them, for the reason that the life of the franchise under which they operate is a matter of only thirty-one years' duration, while the viaduct is supposed to be practically indestructible. The proportionate amount of the respective contributions that should be made by the steam railroad company, by the public, represented by the city or county, and by the street railway company operating over the crossing so changed, is primarily a matter for legislative action. The General Assembly has laid down the rule fixing the proportion of the steam railroad at sixty-five per cent., and that of the city or county at thirty-five per cent.; and the power is given under Section 8892, G. C., for the municipality to charge a proper amount of its share against a street railway using the street at such crossing. This amount has been fixed by the General Assembly at not to exceed one-half of the thirty-five per cent. charged against the city. Considering the situation of the old grade crossing and the conditions surrounding it, the necessity for its elimination and the benefits accruing from the construction of the new viaduct, we are of the opinion that no case could be found where the propriety of charging the maximum amount allowed by the Legislature would be greater than the one under consideration here, and we therefore feel in a measure bound by the legislative expression of the proper portion to be charged against the street railway company; and while it is argued that the balance of the life of the present franchise under which the street railway is operating is only thirty-one years, it must be remembered that the policy of the law of Ohio, outside possibly of this particular franchise, has never been to permit the granting of a franchise beyond the term of twenty-five years; so it can not be considered that such an argument would prevail as against the expressed policy of

1916.]

Hamilton County.

the Legislature. But aside from this policy of the Legislature, we think the amount of the judgment in the lower court was fully sustained by the evidence submitted.

— The evidence shows that in the opinion of experts the same travel, other than that by street railway, could be accommodated by a viaduct ten feet narrower than the one actually constructed. In other words, not considering the travel in the street cars, a viaduct fifty feet in width without a street railway would accommodate the same travel as does one sixty feet in width where a railway has been placed upon it. And the cost of the additional ten feet of the viaduct was shown to be from about \$64,000 to \$66,000.

It is also shown that a considerable saving would be made to the defendants in the expense of watchmen and maintenance of tracks, frogs and repairs, each year, which if capitalized for the thirty-one years of the franchise still to run would represent a capital of from more than twenty-five to twenty-eight thousand dollars, depending upon the rate of interest at which it was figured; that the rental value for the balance of the term of the franchise figured upon only the amount of the judgment would be from \$47,000 to \$51,000; that in addition to these figures a great advantage is obtained by the defendant companies by the removal of probability of damage that may be caused by possible accidents at a grade crossing, the amount of which is not subject to accurate calculation.

It was further shown that new double tracks to the value of \$15,200 had been included in the construction of the viaduct, as well as trolley poles to the value of \$980.

The defendant companies have not indicated accurately what they regard as the proper charge to be placed upon them for their share of the expense of this improvement. The amount of the judgment below being considerably less than the maximum as fixed by the General Assembly in Section 8892, G. C., and the amount having been fixed in the trial below by the verdict of a jury upon a full and fair presentation, this court upon a full consideration of all the evidence is not inclined to fix a

different amount, but is of the opinion that the amount found by the jury and fixed by the judgment of the court of common pleas from which this appeal is taken, is a proper finding and amount, and a reasonable charge to be made against the defendants for their share in this improvement.

A judgment may be taken in this court similar to that in the court below.

JONES (E. H.), J., and GORMAN, J., concur.

LAPSING OF A DEVISE TO AN ILLEGITIMATE CHILD.

Court of Appeals for Knox County.

**BERTHA OWENS ET AL V. ETTA HUMBERT, AS EXECUTRIX OF THE
LAST WILL AND TESTAMENT OF DAVID K.
BLYSTON, DECEASED.**

Decided, May 20, 1916.

Wills—Intention of Testator Not Controlling—As to a Devise to an Illegitimate Child—Whose Death, Leaving Children, Preceded that of the Testator—Construction of the Words “Child or Other Relative” as Used in Section 10581, General Code.

A devise to an illegitimate child, whose decease occurs prior to that of the testator, lapses on the death of the testator, and does not pass to the children of said illegitimate child, notwithstanding the will indicates an intention on the part of the testator that it should pass to the children of the child of his bounty.

L. C. Stillwell, for plaintiffs in error.

Moore & Sperry and *Columbus Ewalt*, contra.

HOUCK, J.

This is a proceeding in error prosecuted from the Common Pleas Court of Knox County, Ohio, seeking to reverse the judgment of that court in its finding that a certain legacy of five hundred dollars which had been given to Elizabeth Owens, the mother of the plaintiffs in error, under Item 7 of the last will

1916.]

Knox County.

and testament of David K. Blyston, deceased, had lapsed. Item 7 of said will reads as follows:

“Upon the death of my said wife I desire and direct my executrix to pay over and deliver to Ester Humbert, daughter of Etta Humbert, the sum of five hundred dollars; to D. K. Bly Mavis, one thousand dollars; to W. H. Blyston, my nephew, five hundred dollars; to Flora Heater, my niece, five hundred dollars; to Elizabeth Owens, five hundred dollars.”

This cause was submitted to the court below on an agreed statement of facts, which the court found in its judgment and decree to be true, the agreed statement of facts being as follows:

“*First.* It is agreed that on the 10th day of March, 1914, David K. Blyston died, leaving a will whereby he appointed the plaintiff (Etta Humbert, executrix) as the sole executrix, and which will was admitted to probate in the Probate Court of Knox County, Ohio, as alleged in the plaintiffs’ petition.

“*Second.* It is agreed that a true and correct copy of the last will and testament of David K. Blyston is attached to the plaintiffs’ petition.

“*Third.* It is agreed that Elizabeth Owens, named in said will, was the illegitimate daughter of the said David K. Blyston.

“*Fourth.* That the said Elizabeth Owens died on or about the 8th day of January, 1913, before the death of the said David K. Blyston.

“*Fifth.* That the said Elizabeth Owens left surviving her and the said David K. Blyston her children: Bertha Owens, Stella Bell, and Harry Owens.

“*Sixth.* That the said Elizabeth Owens was married under the name of Blyston, and that her said father, David K. Blyston, was present at her wedding and gave her away in marriage.

“*Seventh.* That the said David K. Blyston frequently wrote letters to the said Elizabeth Owens and always addressed her in said letters as ‘Dear Daughter.’ That the said Elizabeth Owens always addressed him in her letters as ‘Dear Father.’

“*Eighth.* That the said David K. Blyston frequently visited the said Elizabeth Owens and her family.

“*Ninth.* That at the time of her last sickness he went to visit her at the hospital in Mt. Vernon, and there arranged for her care and comfort.

“*Tenth.* That the said David K. Blyston was present at and attended the funeral of the said Elizabeth Owens, and manifested great sorrow and grief at her death.”

It is contended by defendant in error that by reason of the fact that Elizabeth Owens was the illegitimate child of testator, and that she departed this life before the testator, although she left issue surviving her, that said five hundred dollar legacy given to her in said will thereby lapsed, and is not saved by any provision of Section 10581 of the General Code of Ohio, which is as follows:

“When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he had survived the testator. If such devisee leaves no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to and vest in such residuary devisee surviving the testator, unless a different disposition be made or required by the will.”

It being admitted that Elizabeth Owens was the illegitimate child of testator, and that she left children surviving her and the testator, was the said Elizabeth Owens such child or other relative as is contemplated by the provisions of said statute, and by reason thereof does the legacy in question go to and vest in her children? This brings us to the real problem to be solved in this case, namely: What is the legal meaning of and the proper construction to be placed upon the words “child or other relative,” as used in Section 10581 of our General Code?

As a general rule words and phrases used in the statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they were used in a different sense. In other words, in the construction of statutes words and phrases used therein which have two significations should ordinarily receive that meaning which is generally given to them in their common use. The words, phrases and sentences of the statute are to be read in their ordinary sense, unless so construing them will lead to what would seem to be an absurdity. If we apply this rule to the case at bar, what is the generally accepted meaning of the word child? When one speaks of his child he means a legitimate child: one born in lawful wedlock.

1916.]

Knox County.

Does Elizabeth Owens or her surviving children come within the saving clause of the statute under consideration? Certainly not. While the general policy of the law in providing for a disposition of property is to keep it within the blood of the ancestor, yet if the language of the statute, "child or other relative," be given its natural construction, we think that the word "child," in contemplation of law as used in the statute, means legitimate child, and that the term "other relative" applies only to persons of the same kind of relationship to the testator as is sustained by a child. That is to say, if the child in the instant case, being illegitimate, and not being entitled to inherit from David K. Blyston if he had died intestate, then it necessarily follows that the children of Elizabeth Owens, deceased, although they are of the same blood of the testator, yet they can not attain any greater rights in the property of David K. Blyston than the mother possessed. The mere fact that the legatee and her children who survive her are related by blood to the testator in no way enlarges the meaning of the term "other relative," because the legal rights of the children in this case to take the legacy in question are to be determined by the rights of the legatee. If upon the death of the legatee the legacy lapsed by operation of law, then the surviving children of the legatee can not properly claim the legacy. While it is true that the testator and legatee here are of the same blood, yet the legatee having been born out of lawful wedlock is what is known in law as a bastard, and since a bastard at common law was *filius nullius*, and therefore kin to nobody, and had no ancestor from whom any inheritable blood could be derived, it therefore follows that the only inheritable right a bastard has to take property is made so by statute; and we hold that the words, "child or other relative," as used in the statute now under consideration, are within the well known and recognized rule of construction that *prima facie* the word child or children, when used in the statute, means legitimate child or children, and that bastards are not within the meaning of the terms, and that child or children, or any other terms of kindred when used in the statute, mean legitimate children or kindred only.

The intention of the testator is said to be the pole-star to guide and control the court in the interpretation of wills. If we could apply that rule in this case and in addition thereto consider the facts as contained in the agreed statement of facts, we are free to say that from the language used in the will, the facts as contained in the agreed statement of facts, and all the surrounding circumstances, there is no doubt in our minds but that David K. Blyston meant and intended that this five hundred-dollar legacy should be paid to his child, Elizabeth Owens, if she survived him, and if not then to her children. By his conduct and acts, as disclosed in the agreed statement of facts, the testator considered her his child, and the object of his bounty, and felt under a moral obligation to care for her and the objects of his and her love and affection. Yet, notwithstanding all this, the intention of the testator must in this instance be set aside and held for naught because it is in conflict with the positive provision of a statutory law, namely, Section 10581 of the General Code of Ohio. Therefore the responsibility of not carrying out the intention of the testator as to the payment of the legacy in question does not rest with the court, but with the residuary legatee.

In view of what we have already said it therefore follows that the court can do but one thing, and that is affirm the judgment of the common pleas court, which we now do.

Judgment affirmed.

· SHIELDS, J., and POWELL, J., concur.

1916.]

Hamilton County.

**LIABILITY OF CONSIGNOR FOR DEMURRAGE CHARGES ON
REFUSAL OF CONSIGNEE TO ACCEPT SHIPMENT.**

Court of Appeals for Hamilton County.

MOORES LIME CO. v. NORFOLK & WESTERN RAILWAY CO.

Decided, February 28, 1916.

*Railways—Shipment in Carload Lots Refused by Consignee—Consignor
Liable for Demurrage Charges.*

Where a shipment upon arrival is refused by the consignee and the shipper is notified by the carrier of such refusal and upon request declines to give the carrier any instructions as to disposition, the carrier then becomes a mere custodian or bailee of the goods to whom the shipper is liable for all charges thereafter accruing.

Charles M. Leslie, for plaintiff in error.*Hollister & Hollister*, contra.

JONES (E. H.), J.

Three carloads of crushed stone were shipped prepaid from the Moores Lime Company at Springfield, Ohio, via the C., C. C. & St. L. and N. & W. railroads to R. Wilhelmy at Bond Hill, Ohio, one car on each of the following dates: September 28, September 29 and October 10, 1910.

There is a written stipulation as to facts in this case which recites:

“The consignee refused to accept and unload said cars. That after said refusal by said consignee to accept or unload said car, notice was given defendant, and defendant was requested to give disposition of same, which defendant refused to do for the assigned reason that it was not the owner of the contents of said cars and had no right to dispose of same.”

This action below was brought by the railway company to recover demurrage charges which accrued after these refusals by the consignee and consignor—the refusal to accept the stone by the former and the refusal to give disposition or exercise ownership by the latter. There is no question raised as to any

fact material to the determination of this case. The question presented is one of law, viz: Under these conditions is the consignor obliged to pay the demurrage charges accruing after the shipment is rejected by the consignee?

Certain principles discussed in argument as having a bearing upon this question are well recognized. For example, it must be conceded that the title to the crushed stone from the time it was loaded at Springfield until it arrived at Bond Hill was in Wilhelmy, the consignee. It would be so considered in the determination of any question arising while the stone was in *transitu*. But when the consignee refused to take the stone there was a changed situation. There was no contract between the carrier and Wilhelmy. The carrier had made a written contract with the lime company to carry and deliver the stone at a certain place, to a person named in the written contract. When the person so named as consignee refused to receive the consignment it became the duty of the carrier to ask for directions or disposition from its employer, who was the only person in the transaction with whom it sustained a contractual relation or had any privity of contract.

The carrier could not be drawn into or be made to suffer by a dispute, of whatever nature, between the vendor and vendee simply because the goods sold were on its cars and in its possession. It had performed its duty in safely delivering the cars and placing same in the yard at Bond Hill.

When the shipment was refused at its destination a new and different relation arose between the shipper and the carrier. The latter became the custodian or bailee of the stone, with duties and responsibilities resting upon it similar to those of a warehouseman. The position taken by the shipper, as indicated in the part of the statement of facts above quoted, is and was untenable. It should have promptly given disposition of cars, upon request from the carrier so to do. The railway company was then justified in looking to it as the owner of the stone, and under the eighth condition of the bill of lading it was liable as "owner" for all charges accruing thereafter.

Judgment affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

1916.]

Delaware County.

COVENANT OF WARRANTY MODIFIED BY PAROL EVIDENCE.

Court of Appeals for Delaware County.

WILLIAM MCKENZIE ET AL. V. GEORGE C. BUCHAMANN ET AL.

Decided, May Term, 1916.

Title—Covenant of Warranty Against Encumbrances—Circumstances Under which It May be Modified by Parol Evidence—Such Modification Not Inconsistent with the Covenant.

1. In an action for damages for breach of covenant against encumbrances, parol evidence is admissible which in any way tends to prove that after execution of the deed containing said covenant, and before its delivery to the grantees, it was agreed between them and the grantor that the grantees should assume a certain unexpired lease constituting a lien on the premises sought to be conveyed, and that but for such agreement the grantor stated he would declare the deal off and destroy the deed.
2. A promise to assume a lien, which is an encumbrance upon the property conveyed, is not in conflict with or inconsistent with the covenant of warranty against encumbrances contained in the deed, but is in effect a discharge of the grantor from liability on the covenant of warranty so far as said lien is concerned.

Marriott, Freshwater & Wickham, for plaintiffs in error.
George C. Snyder, contra.

HOUCK, J.

This is a proceeding in error seeking to reverse the judgment of the Common Pleas Court of Delaware County, Ohio. A jury having been waived the case was submitted to the trial judge on the pleadings and evidence. The facts in the case here submitted are contained in the journal entry of the judgment and finding of facts and conclusions of law by the trial judge in the court below, and are before this court for review.

The parties here stand in reverse order from where they stood in the court below. The suit in the common pleas court was

brought by George C. Buchamann et al against William McKenzie et al to recover three hundred dollars damages for an alleged breach of covenant against an encumbrance in a deed for certain real estate conveyed by defendants to plaintiffs. The court below found for the plaintiffs, and a judgment for three hundred dollars and costs was entered in favor of the defendants in error, the plaintiffs below. Plaintiffs in error ask for a reversal of this judgment for the reason that the court erred in excluding certain testimony and not receiving and considering the same, and that the judgment is contrary to law. The following facts, as shown in the finding of facts by the trial judge, were ruled out and not considered by the court below, and to this the defendants below excepted:

“There was no exception in the deed as it was prepared as to the lease of Alkire and Sands. Alkire and Sands had a lease on the east room they occupied, and which would not expire until November 15, 1915. At the time the deed was read, and before the delivery of the deed, the question arose as to the lease of Alkire and Sands. The plaintiffs desired to know whether they could have possession of the room occupied by Alkire and Sands, and were then informed by McKenzie, defendant, that Alkire and Sands had a right to occupy the room until the 15th of November, 1915, and that unless the plaintiffs would accept the deed with Alkire and Sands’ tenancy, and take the property subject to said lease, that the deed would be destroyed and the deal called off. Thereupon it was agreed by plaintiffs, before the delivery of the deed, that they would accept the deed and take the property subject to Alkire and Sands’ lease, and it was then suggested that the deed be changed and that there be embodied in it an agreement and exception as to Alkire and Sands’ lease, but the deed having been before that time signed by all the parties, and their wives not being present, it was agreed that plaintiffs would accept the deed as written, in order to save re-writing and re-execution, and that they would accept the property subject to the Alkire and Sands’ tenancy.

“These negotiations were oral, and the conversation took place before the delivery of the deed. Upon the agreement by the plaintiffs that they would accept the property and pay the price of \$7,800 subject to the encumbrance of Alkire and Sands’ lease without changing the deed; the deed was then delivered to plaintiffs and the consideration was paid, and the court finds

1916.]

Delaware County.

the facts to be that the plaintiffs accepted said deed as written, and without change subject to the Alkire and Sands' lease, it having been stated to plaintiffs before the deed was delivered that unless they would so accept the property with the encumbrance of Alkire and Sands thereon the parties would destroy the deed and the trade would be off; and the court finds from the evidence that it was stated orally by plaintiffs that they would accept the deed and pay the price subject to Alkire and Sands' lease, and that it was not necessary to put that exception in the deed, and the court finds that the trade was then consummated and the deed delivered without the exception being written therein."

It will be conceded as a well settled principle of law that parol evidence can not be received to vary, contradict or change the terms of a written contract, because it is presumed that all of the provisions and terms of the contract are embodied therein; but in the case at bar the deed had been written, signed, witnessed and properly executed, but had not been delivered, and before its delivery, as disclosed in the finding of facts, the plaintiffs below agreed to waive the covenant of the warranty as to the lease in question and accept the property described in the deed subject thereto. Quoting from the finding of facts, "it was agreed that the plaintiffs would accept the deed as written, in order to save re-writing and re-execution, and that they would accept the property subject to the Alkire and Sands' tenancy, it having been stated to plaintiffs before the deed was delivered that unless they would so accept the property with the encumbrance of the Alkire and Sands' lease thereon the defendants would destroy the deed and the trade would be declared off; and then the plaintiffs said they would accept the deed subject to said lease and pay the price, and the deed was then delivered and accepted."

We can not weigh the evidence in the present case and are bound by the facts as contained in the finding of facts. If a bill of exceptions containing all the testimony from the trial below had been prepared and presented to us for review, we are not prepared to say what conclusion we would have reached as to the weight of the testimony in question.

It will be observed that the testimony under consideration was concerning what occurred at the time of, and was offered to establish a contract that was claimed to have been made and entered into between the covenantors and covenantees after the execution of the deed in question and before its delivery. The facts disclose that the deed would not have been delivered by the covenantors to the covenantees, but would have been destroyed, if the covenantees had not agreed to accept the same and assume the lease in controversy.

Under these circumstances we can not conceive of a rule of evidence so far reaching and so inequitable as to preclude the admissibility of such testimony. We therefore hold that parol evidence was admissible in the case at bar that in any way tended to prove that after the execution of the deed which contained covenants against encumbrances, and before its delivery to the grantees, it was agreed between them that the grantees should assume the lease in question, which was a lien upon the premises conveyed.

The weight to be given such evidence was to be determined by the trial judge to whom the case had been submitted, a jury having been waived by the parties in this case. We think in the present case that a parol agreement entered into between the grantors and grantees, wherein the grantees were to assume the lease, was the moving cause of consummating the deal.

Let us inquire: Does proof of a promise to assume a lien, which is an encumbrance upon the property conveyed, conflict with or is it inconsistent with the terms of the conveyance? Certainly not. Can there be any doubt, in a suit for a breach of a covenant against an encumbrance, it could be shown by proper evidence that a lien (a lease in this case) had been assumed by the grantee after the execution of the deed and before its delivery? We think not. The effect of the promise, which was proved by parol evidence in this case, was only to show that the grantees had agreed to assume the lease before the delivery of the deed, and thereby the lien on the property conveyed had been discharged so far as the grantors were concerned, and by

1916.]

Hamilton County.

reason thereof they were released from any liability on the covenant of warranty as to the lease.

For the reasons given we are of the opinion that the judgment of the court below should be reversed. Judgment reversed, and the cause is remanded to the common pleas court for a new trial.

SHIELDS, J., and POWELL, J., concur.

EMISSION OF OFFENSIVE ODORS BY A REDUCTION PLANT.

Court of Appeals for Hamilton County.

THE UNION REDUCTION COMPANY v. JOHN STORY.*

Decided, April 14, 1916.

Injunction—Lies Against Operation of a Plant Throwing off Noisome Odors, When.

A reviewing court will not disturb an order enjoining a reduction plant from casting off noisome or offensive odors, where it is in evidence that such odors have been emitted to the annoyance of persons living nearly half a mile distant, and experts have testified without contradiction that with a plant properly equipped the emission of such odors could only be due to carelessness or accident.

Peck, Shaffer & Peck and Healy, Ferris & McAvoy, for plaintiff in error.

Kelley & Remke, contra.

JONES (E. H.), P. J.

In the court below John Story asked for an injunction against the Union Reduction Company restraining it from casting upon his premises and into his dwelling-house noisome smells, gases, odors, etc., arising from its garbage and dead animal crematory or reduction plant.

*Affirming *Story v. Union Reduction Co.*, 19 N.P.(N.S.),—.

Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court May 29, 1916.

A permanent injunction was granted in this language:

“It is therefore ordered, adjudged and decreed by the court that an injunction be, and the same hereby is granted, restraining the defendant from operating its reduction plant so as to continuously create or cause to be cast upon the land of the plaintiff described in the petition any noisome or offensive odors, vapors or gases, or into or about the dwelling of plaintiff to the serious injury of plaintiff in health, comfort or property from and after the date of the entry of this decree.”

The company seeks here a reversal of this judgment.

There was a large number of witnesses called upon either side and, needless to say, the testimony is conflicting. There is a preponderance, however, in support of the finding of the court that “at certain times a nuisance is created by the way in which the defendant’s reduction plant is operated.”

The reduction company has a contract with the city of Cincinnati requiring it to gather and dispose of by cremation and reduction process the garbage, dead animals and animal offal of the city. This work by law devolves upon the city, but there is statutory authority for the contract made with the plaintiff in error by the city, Section 3809, G. C.

It is claimed that the plant has the sanction of the Legislature and city council, that it is performing a public function that has to do with and is closely related to the health and general welfare of the people of Cincinnati and that for these reasons an injunction will not lie. The authorities to which we are cited support this claim but provide that the work must be done with a high degree of care and with constant vigilance by those in charge to see to it that only the latest and most improved machinery and appliances are employed.

The evidence shows without contradiction that this plant at the time of the final hearing, in its plan and equipment, was fully up to date. Mr. Jesse Moorman, president of the company, and Mr. Charles E. Woodworth, a man of many years’ experience and an expert upon the subject, were called by defendant below and testified as to the character of the plant.

Mr. Moorman testified that:

1916.]

Hamilton County.

“The plant at our last trial was in an uncompleted condition. Since then we have completed all the buildings, we have put new conveyors in the entire plant, we have added four more units to the digestors, we have completed the decreasing plant, and installed one new drier and a scrubber.” (Record, p. 697.)

“Since the last trial we have rebuilt this plant. In that time we have added—well, we have put in a complete new conveyor system from start to finish. A portion of this decreasing plant was installed at that time, and one boiler, and one drier, and four units of digestors, and the scrubber we have put in since that time.” (Record, p. 705.)

He also testified that he was in the garbage and reduction business at the same time in Indianapolis and St. Louis, and was familiar with other plants in the United States.

“Q. Do you know of any mechanism for the distribution of gases, or elimination of odors, not in operation in this plant by yourself? A. I do not.” (Record, p. 702.)

“Q. What are the odors coming from the plant now, Mr. Moorman, what causes them? A. What odors do you mean?

“Q. I mean the odors that emanate from that plant; you get odors from the plant, do you not? A. You don't get odors from the plant unless you go on our premises and get close to the plant.

“Q. You say there are no odors that carry away from the plant? A. No, not to amount to anything, no, sir.” (Record, p. 710.)

“Q. You think, so far as you know, there are no carrying odors from that plant today? A. I think not.” (Record, p. 711.)

Mr. Woodworth testified as follows:

“Q. I will ask you to state whether there is any device or mechanism in use anywhere for the elimination of odors and the destruction of the two smelling gases that has not been introduced at this plant, any successful device? A. I know of none.

“Q. I wish you would state to the court whether there is anything in the plan of operations, or in the mechanism to be used which can be added to this plant to further eliminate the

odors. A. I know of nothing, comparing them with other plants of similar character in the country."

"Q. What difference is there in the carrying of the odors now and a year ago? A. Well, with the device they have introduced they have mitigated the carrying of the noxious and offensive gases and odors to the extent of introducing an appliance that is accepted by all the garbage concerns in this country as being the most practical for this purpose." (Record, pp. 661-662.)

"Q. Do you know of any plant that is superior to this equipment, to this plant, for the handling of the same tankage tonnage? A. know of no plant, to my knowledge, sir." (Record, p. 663.)

"Q. With the introduction of the new apparatus, you say it will eliminate all the far carrying odors? A. Yes, sir, except under extraordinary conditions.

"Q. Except when there would be carelessness of the employes, valves getting out of order or the pipes bursting? A. Yes."

"Q. About how far away from that plant would you say the local odors that are peculiar to the plant, would be discerned? A. Well, according to the direction of the wind, sir. If you were in the teeth of the wind, that might carry two or three blocks, and if you were against the wind you wouldn't know the plant was there.

"Q. Well, now, if you were to be told that during the past five or six months, as often as once or twice a week, the people experienced the most disagreeable odors and that of burning flesh and garbage, at a distance from half a mile to a mile and a quarter, to what would you attribute that? A. Two or three times a week? If such were an established fact, I would think there was carelessness that often." (Record, pp. 675-676.)

"Q. If you were to be told people in their homes a distance of from half a mile to a mile and a half were frequently unable during the past five or six months to eat their meals in comfort because of this sickening odor, what would you say that odor came from? A. I couldn't tell of any other source, of an odor of that type, so far carrying, that would come from any other part of that process except what I told you, from gas that came

1916.]

Coshocton County.

from the digester that was allowed to escape through some cause, either negligence or an accident.” (Record, p. 678.)

We thus have proof from the company’s witnesses that, except through carelessness or accident, there could be no appreciable annoyance to Mr. Story who lives nearly half a mile from the plant.

We can not see, therefore, how the plaintiff in error can justly complain of the restraining order granted by the court below. If its own expert witnesses are correct (and their evidence is not denied or controverted), there is no excuse in law or morals for offensive odors reaching Mr. Story’s home twenty-three hundred feet away. It seems to us that the order granted below restraining the defendant company from operating its reduction plant so as to continuously annoy Story in his said home with noisome or offensive odors, vapors or gases is reasonable and proper, and one from which there can be no relief in a reviewing court.

Judgment affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

**JUDGMENT ATTACKED ON WEIGHT OF EVIDENCE
GIVEN BY RELATIVES.**

Court of Appeals for Coshocton County.

PAULINE CRAWFORD v. W. S. MERRELL, TRUSTEE, ET AL.*

Decided, February 28, 1916.

Transaction Between Relatives—Evidence Relating to, Given by Relatives—Need Not be Regarded with Suspicion, When—Weight of Evidence—Charge of Court.

1. An instruction to the jury that transactions between relatives “are always viewed with suspicion, and their testimony with regard to such transactions must be taken with allowance,” is not prejudicial

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 16, 1916.

where followed immediately by the statement that if such testimony "is of such a nature as to carry conviction to your mind that said witnesses are telling the truth, then it is entitled to as much weight as that of any other witnesses."

2. The rule that a reviewing court will not set aside a judgment on the ground of weight of the evidence, applies to a judgment which is based on evidence which is conflicting and of a character as to which different minds might arrive at different conclusions.

C. R. Bell, George D. Klein and Frank Pigman, for plaintiff in error.

F. E. Pomerene, Joseph L. McDowell and W. S. Merrell, contra.

HOUCK, J.

This is an error proceeding prosecuted from the common pleas court of this county to this court. The parties here stand in the reverse order in which they stood in the common pleas court. The plaintiff in error seeks to reverse a judgment of the common pleas court of Coshocton county in the sum of four thousand dollars which was entered on the verdict of the jury in the trial of said cause against said plaintiff in error, who was the defendant below. The suit below was brought by the defendant in error, the plaintiff below, as trustee in bankruptcy of Walker and Lawrence, against the plaintiff in error, the defendant below, to recover certain corporate stocks, or the value of same, alleged to have been transferred by Frank A. G. Lawrence, one of the bankrupts, to his mother, Pauline Crawford, the plaintiff in error.

The second amended petition avers that said Lawrence, while indebted to numerous banks and individuals, and at the time such indebtedness was created, was the owner of the corporate stocks in question and was at said time and ever since unable except for same to pay his debts and except for same was insolvent. That while so indebted he transferred to his mother, Pauline Crawford, the defendant, said stocks gratuitously and without consideration.

The defendant denied by answer all the material allegations in the second amended petition, and the cause, upon the pleadings

1916.]

Coshocton County.

filed, went to trial, resulting in a verdict in the sum of four thousand dollars in favor of the trustee. A motion for a new trial was filed, heard by the court, and overruled, and a judgment was entered on the verdict. A petition in error was filed in this court, and a bill of exceptions containing the testimony of more than twenty witnesses, covering nearly two hundred pages of typewritten matter. This case being an important one, presenting several new questions of law and fact, the court has given it much time, and with no little amount of labor we have read the testimony of all of the witnesses. The petition in error sets forth many grounds of error, for which a reversal of the judgment below is sought. We have examined all of the grounds of alleged error and think that the following are the only ones urged by counsel in their brief and presented in oral argument which we deem necessary to discuss:

First. Is the second amended petition sufficient in law?

Second. Did the court err in its admission and rejection of testimony?

Third. Did the court err in refusing to give to the jury special written requests before argument presented by the defendant below?

Fourth. Was the verdict of the jury against the manifest weight of the evidence?

We have examined the second amended petition and while in some respects it is not as clear and definite as it might be, yet it specifically sets forth the facts in such language as to fully and completely advise the defendant below of the claim made, and is, as we feel, a concise, legal and logical statement of the claims relied upon by the plaintiff, and is therefore sufficient in law.

Counsel for plaintiff in error strenuously contend that the trial court erred prejudicially as to the rights of their client in that part of the general charge in which the court said:

“Transactions between mere relations are always viewed with some suspicion, and their testimony in regard to such transactions must be taken with some allowance.”

Counsel say:

“This statement was very prejudicial, an invasion of the province of the jury, the giving of impeaching testimony by the court, and strictly against the law.”

We agree with counsel that the above statement as to the law with reference to transactions between relatives is and would be erroneous and prejudicial if given in that language and without modification, but the trial court modified the above, which will be observed by reading the general charge. Following the above language and in the same sentence we find the following:

“But if it is of such a nature as to carry conviction to your mind that said witnesses are telling the truth, then it is entitled to as much weight as that of any other witness.”

Counsel for plaintiff in error in their brief did not give all the language used in that connection by the trial court. It will not do to take isolated sentences and statements in the general charge and predicate error thereon. All the language used concerning the particular subject must be taken into consideration, and from this determine whether or not the charge is sound in law and pertinent to the issue to be determined.

Applying this rule to that part of the charge complained of, we can reach but one conclusion and that is that it is a correct and proper statement of the law governing the weight that should be given evidence offered by relatives as to transactions between them.

While the bill of exceptions discloses some technical errors in the admission and rejection of certain testimony, we do not think it in any way prejudiced the substantial rights of the plaintiff in error.

Did the court err in refusing to give the special charges before argument as requested by the defendant below? If these special written requests were correct propositions of law applicable to the issue or issues to be determined in the present case, then it was prejudicial error to refuse them. With the view of ascertaining whether or not they are within this rule, we have

1916.]

Coshocton County.

carefully examined them and find that as abstract propositions of law they are sound but not applicable to the particular facts and the issues to be determined in this controversy, and therefore the court committed no error in refusing to submit them to the jury.

The one real question of fact in this case and which was presented to the jury for determination—was Frank A. G. Lawrence at the time of the transaction in question solvent or insolvent? This being a question of fact was wholly and entirely for the jury to try and determine. We have read all of the testimony of the witnesses pro and con bearing upon this question, and we have no hesitancy in saying that the evidence is somewhat conflicting, being of such a character and nature that different minds might arrive at different conclusions. Questions of fact are for the jury to determine and questions of law for the court to pass upon. Courts should not invade the rights of a jury, and we do not think it is within the province of nor do we feel that it is the duty of a reviewing court to set aside a judgment entered on the verdict of a jury for the reason that the same is against the weight of the evidence, unless from an examination of all of the evidence the judgment is manifestly against the weight of the same; and of this fact the reviewing court must and should be clearly satisfied, and not so finding in the instant case the judgment below will not be reversed on the alleged error of the verdict of the jury and the judgment entered thereon being against the manifest weight of the evidence.

It therefore follows from what we have already said that we find no error in the record prejudicial to the rights of the plaintiff in error, and so finding, the judgment of the common pleas court must be affirmed.

Judgment affirmed.

SHIELDS, J., and POWELL, J., concur.

VALIDITY OF SEWER ASSESSMENT AGAINST ACREAGE TRACT.

Court of Appeals for Hamilton County.

HORATIO W. BURCKHARDT ET AL V. CITY OF CINCINNATI ET AL.

Decided, November 29, 1915.

Sewers—Assessment Against Acreage Tract—Held Valid Although Present Buildings Could Not be Connected with the Sewer.

Where an acreage tract improved by only one dwelling but susceptible of subdivision to better advantage with lots fronting in part upon a street in which a sewer has been constructed, which is available for the sewerage of the lots abutting it, but not for the dwelling now on said land, the assessment for such sewer will not be held invalid but the lien for same will be restricted to so much of the land as abuts upon such sewer to the usual depths of lots in the neighborhood. (Section 3813, General Code.)

Black, Swing & Black, for plaintiffs.

Walter M. Schoenle and Frank K. Bowman, City Solicitors, contra.

JONES (Oliver B.), J.

Plaintiffs own a tract of land of about seventeen acres, not subdivided into lots, lying on the northwesterly side of Madison road. It is now improved with but one dwelling house thereon which is located south of the center and fronts towards Madison road, and which has no sewer connections, the house drainage being carried into a cess pool. The eastern boundary is Vista avenue, which runs northwardly from Madison road. The natural drainage of the land is to the west and south.

Under certain proceedings of the council of the city of Cincinnati, commenced by the resolution declaring it necessary to improve by sewerage, passed December 27, 1910, sewers were constructed in certain streets, including that part of Vista avenue abutting 280 feet along the northern part of plaintiff's

1916.]

Hamilton County.

property, and an assessment was levied on each front foot of the lands abutting thereon of \$1.60 to pay the cost and expense of such improvement, by an ordinance passed November 13, 1911.

Under a contract dated April 11, 1913, plaintiffs granted to the city of Cincinnati the right to construct and maintain a trunk sewer through the western part of their lands, which should carry off the surface drainage and storm water of the adjoining lands, and plaintiffs were given the right to tap such sewer without assessment or charge to them for the purpose of connecting such tributary sewers as they might thereafter see fit to build in accordance with city specifications, for the sewer-ing and drainage of their property as it should be developed. Madison road was also improved by the construction of a sewer therein.

Plaintiffs seek in this action to enjoin the collection of the assessment for the Vista avenue sewer on the ground that it can be of no benefit to their property because it is only three to four feet below the basement of the present residence, and that their premises do not need local drainage and are otherwise sufficiently provided therewith (Section 3819, General Code).

It would probably not be practical to use this sewer in Vista avenue for the house drainage of the present residence because of its depth and the fact that it is so far from the residence, and the natural topography would make a sewer connection preferable either with the sewer in Madison road or with the trunk sewer in the ravine in the western part of the premises. But the property might be so divided as to lay out lots on Vista avenue fronting that part in which the sewer is laid, and houses built thereon could be so constructed as to tap and use this sewer; and under the doctrine of *Cincinnati v. Bickett*, 26 Ohio St., 49, and *Ford v. Toledo*, 64 Ohio St., 92, the assessment for this sewer should be sustained. In levying the assessment against this property council should have fixed the depth to which the lien would attach to the fair average depth of lots in the neighborhood (Section 3813, General Code). If so desired, that may be fixed now in the decree.

It appears to the court that if the present arrangement for the sewerage of these premises had been in existence at that time, so far as this property is concerned that part of Vista avenue abutting it might have been omitted; but there is nothing before the court to show that it may not have been necessary for the drainage of property on the opposite side of Vista avenue.

This improvement had been made and the assessment levied some time before the sewerage contract was entered into between plaintiffs and the city, and the fact that it was not mentioned in that contract leads to the belief that it was not intended by the parties that the arrangement made therein should in any way affect the validity of the Vista avenue assessment. It must therefore be held legal, and plaintiff's petition is dismissed.

JONES (E. H.), P. J., and GORMAN, J., concur.

1916.]

Hocking County.

**CONTRACT THAT FOSTER CHILD SHOULD INHERIT
ENFORCED.**

Court of Appeals for Hocking County.

DELLA SNYDER V. MAY SHUTTLEWORTH ET AL.

Decided, February 25, 1916.

Specific Enforcement of Contract—Providing for Adoption of Child and Making Her an Heir—Persons to Whom the Property Has Descended—Required to Make Conveyance in Accordance With Said Agreement.

A written contract, entered into by the parent of an infant child with strangers, by the terms of which the latter agreed to adopt such child, perform the duties and obligations of parents to such child, and further agreed that such child should inherit from each all property which she would be entitled to inherit if she were their own child, will be specifically enforced, by requiring the person to whom the legal title has descended to convey the property in accordance with the terms of the contract, when such contract has been fully performed on the part of such child.

John W. Dennis filed his petition in the court of common pleas, stating that on the 27th day of January, 1881, he married Margaret A. Hartley, who died the 17th of October, 1906, seized of 73.6 acres, more or less, of land in Hocking county, Ohio. The prayer was for dower.

By leave of court Della Snyder filed an answer and cross-petition, and later an amended cross-petition which, omitting the formal parts, reads as follows:

“On or about the 15th day of June, A. D. 1874, one James Lanning, the father of this answering defendant, duly entered into a written agreement with John J. Dennis and Eliza A. Dennis, his wife, wherein and whereby it was mutually agreed by and between the said parties, that said James Lanning, who was then a widower, should, and by the terms of said agreement did, give, grant and surrender unto the said John J. Dennis and Eliza A. Dennis, his infant daughter, this answering defendant, then about the age of two years.

“That such grant and surrender was made for the sole purpose of having his said infant daughter, Della Lanning, adopted by the said John J. Dennis and Eliza A. Dennis according to law.

“And in consideration thereof the said John J. Dennis and Eliza A. Dennis promised, covenanted and agreed with the said James Lanning, that upon the execution of said contract to legally adopt said infant child Della Lanning, now Della Snyder, and would accept the rights and perform the duties and obligations of a parent to said child, and that said child should in all respects be to them and each of them as that of a child born in lawful wedlock.

“That said child should inherit by law from each of them any and all property to which she would be entitled to inherit if she were the legitimate child of the said John J. Dennis and Eliza A. Dennis, his wife, or either of them.

“This defendant avers that said James Lanning, who is now deceased, and this defendant duly performed all the agreements and covenants of said contract on their part to be performed. That he duly surrendered his said infant child to said John J. Dennis and Eliza A. Dennis, who thereafter claimed, demanded and received all her services from said June 15, 1874, until December 24, 1891.

“This defendant avers that upon her surrender by her father, James Lanning, as aforesaid, that she was by the said John J. Dennis and Eliza A. Dennis taken to their home, where she remained continuously until December 24, 1891, when she was by and with the consent of said John J. Dennis and Eliza A. Dennis married and left their home.

“That from said June 15, 1874, until December 24, 1891, she duly performed all the terms, conditions and covenants of the said agreement under their command, performing household and kitchen work, and for a large part of the time working in the fields on their farm, performing the labor of a man. That for more than sixteen years she worked for the said John J. Dennis and Eliza A. Dennis under their orders and demands and by virtue of the terms of said contract, and received no compensation therefor except her boarding and clothing.

“This defendant further avers that said John J. Dennis and Eliza A. Dennis did not perform their part of said agreement in this, to-wit: They did not cause said Della Lanning to be adopted as their child according to law; nor they or either of them, by will or otherwise, provided for said child so that she would, or could, inherit or receive in any other manner the

1916.]

Hocking County.

property to which she would have been entitled to inherit if she were the legitimate child of said John J. Dennis and Eliza A. Dennis.

“This defendant further says that on March 8th, 1902, said John J. Dennis died intestate, leaving the plaintiff, John W. Dennis, his only child and heir at law. That on December 10, 1903, the said Eliza A. Dennis died intestate, leaving Margaret A. Dennis, wife of said John W. Dennis, her only child and heir at law. That on October 17th, 1906, the said Margaret A. Dennis died intestate, leaving the defendant, May Shuttleworth, intermarried with the defendant, Hugh C. Shuttleworth, her only child and heir at law.

“That said Eliza A. Dennis died seized in fee simple of the premises in the petition described, together with some other lands now disposed of. That said lands descended to her daughter, Margaret A. Dennis, subject to the rights of this defendant therein.

“That said Margaret A. Dennis died seized of the premises in the petition described, but subject to the rights and interest of this defendant therein. That subject thereto the said lands descended to the said defendant, May Shuttleworth.

“That the defendant, May Shuttleworth, has ever since October 17, 1906, received all of the rents, issues and profits from the said lands.

“That said contract has been lost or destroyed, and for that reason she can not attach a copy to this pleading. That she did not know the terms and conditions of said contract and her legal rights thereunder until within two years prior to the filing of her answer and cross-petition herein.” * * *

A general demurrer to the amended cross-petition was sustained.

John C. Pettit and C. W. McCleary, for plaintiff in error.

Tom O. Crossin, contra.

SAYRE, J.

There is presented for determination the question, whether a written contract, entered into by the parent of an infant child with strangers, by the terms of which the latter agreed to adopt such child, perform the duties and obligations of a parent to such child, and further agreed that such child should inherit

from each all property which she would inherit if she were their own child, will be specifically enforced when fully performed on the part of such child.

This question is discussed, but left undecided, in *Shahan v. Swan*, 48 O. S., 25, 31, 32. The question was not presented in that case because the contract there under consideration was a parol contract.

The case of *Schwartz v. Steel*, 8 C. C., 154, which was reversed in 55 O. S., 685, on the authority of *Shahan v. Swan*, was also founded upon an oral contract.

There was introduced in that case—*Schwartz v. Steel*—the record of a proceeding in the probate court, by which the parties who had agreed to adopt the child undertook to carry out that agreement when the latter was twenty-one years of age. But this record, which consisted of a petition signed by Carnahan and wife, “disclosing their intention to make Sarah Ann their heir,” and her consent thereto, and the journal entry of the adoption which had been placed upon the records of the probate court, would fail utterly to show that Carnahan and wife, when Sarah Ann was two years old, had proposed to adopt her as their own and make her their heir. In other words, this record wholly fails to show a written contract for adoption made with the Carnahans when Sarah Ann was a child, and the contract proven was an oral one, which brought the case within the rule of *Shahan v. Swan*.

So the question for our consideration has never been decided in Ohio so far as shown by reported decisions.

In many jurisdictions an oral contract of this character, when fully performed on the part of the person for whose benefit the contract was made, will be specifically enforced. Written contracts were specifically enforced in the following cases: *Chehak v. Battles* (Ia.), 110 N. W., 330, 8 L. R. A. (N. S.), 1130; *Sharkey v. McDermott*, 11 Mo., 648, 4 S. W., 107; *Winne v. Winne*, 166 N. Y., 263, 82 Am. St., 647; *Burns v. Smith* (Mont.), 53 Pac. Rep., 742; *Fiske v. Lawton* (Minn.), 144 N. W., 455; *Anderson v. Anderson* (Kan.), 88 Pac., 743, 9 L. R. A. (N. S.), 229; *Starnes v. Hatcher* (Tenn.), 117 S. W., 219. In these

1916.]

Hocking County.

cases many objections raised to the power and right of a court of equity to decree specific performance have been considered, and it is unnecessary to repeat what is therein reported.

In *Starnes v. Hatcher, supra*, the opinion (p. 221) says this:

“Unquestionably, so far as the contract contemplated fixing a status for these complainants as heirs by statutory adoption, this now can not be done. By the death of Starnes, who failed during life to comply with his obligation to adopt these parties, it is made impossible for the courts to do what he should have done in this regard. But it does not follow from this that the complainants are to be cut off from all relief. As we have seen, his agreement was not only to adopt, but to leave these parties at his death his estate. Thus it covered two different duties, which he obligated himself to discharge. These were as distinct in character as if he had bound himself in a strictly legal manner, upon a valuable consideration, to convey two tracts of land to another. To a bill to enforce specific performance of such contract he would not be permitted to repel one seeking its enforcement upon the ground that, subsequent to the contract, he had incapacitated himself from a performance of it in its entirety by selling to a third party one of the tracts covered by his covenant. In such case, upon the election of the complainant, relief would be granted, at least to the extent of the tract remaining unsold. Story's Equity Jurisprudence, Section 779.”

So in the case under consideration John J. Dennis and Eliza A. Dennis having agreed to adopt Della Snyder (then Lanning), and having agreed that she should inherit any and all property to which she would be entitled if she were their child, there is no reason, since the contract can not be enforced as to the matter of adoption, why it should not be enforced as to the property.

Now the contract does not bind John J. Dennis and Eliza A. Dennis to leave their property so that Della would inherit anything from them. The contract only requires that she shall inherit such property as she would be entitled to inherit if she were their child. She was to be treated, so far as the property was concerned, as they would or might treat one of their own children. Eliza A. Dennis and her husband could have devised all their property, or conveyed it by deed, to some other person and Della would not have had any redress whatever. *Pemberton*

v. *Perrin* (Neb.), 144 N. W., 164; *Doppmann v. Doppmann*, 114 N. Y. Supp., 620, 122 N. Y. Supp., 1126; *Crawford v. Wilson* (Ga.), 78 S. E., 30. If Eliza A. Dennis had devised or conveyed by deed all her property to Margaret A. Dennis, Della Snyder would have been like any other child who is disinherited, because a parent may dispose of his property by will or deed without regard to his children.

But the property was not conveyed by deed or devised. It was left to pass by law, and the legal title has descended to May Shuttleworth. If Della had been adopted, as agreed, she would now have been the owner of the undivided one-half of the premises described in the petition. Eliza A. Dennis and her husband have, therefore, failed to comply with their contract, although Della has fully complied with hers. Since the property has passed under the statute of descent, Della is entitled to be treated, so far as this property is concerned, as if she were the child of Eliza A. Dennis. Della Snyder did not inherit the property. She is not an heir of Eliza A. Dennis. Her rights in the premises are lodged in the written contract of 1874, fully performed by her.

In *Emery v. Darling*, 50 O. S., 160, the contract was that the property should pass by will, and it was held that at the death of the promisor the promisee was the equitable owner of the same.

In the instant case the property is to pass by means of adoption. In each case the person making the promise failed to comply with its terms. In each case the property passed by descent. If, after the property passed by descent in the one case, the person to whom the promise was made became the equitable owner thereof, no reason can be assigned why the person to whom the promise was made in the other did not become the equitable owner of the property in controversy.

The contract is in writing, and hence does not conflict with the statute of frauds. The title to an undivided one-half of the premises described in the petition descended to Margaret A. Dennis in trust for Della Snyder, and then on the death of Margaret A. it descended to May Shuttleworth in trust for

1916.]

Stark County.

Della Snyder. There is no obstacle to a specific performance, and it is only justice that, after her father released her to a stranger and gave up the society of his daughter, according to the contract of 1874, and after Della has fully completed the same, she should now be decreed what it was agreed she should have when the contract was made.

The demurrer to the amended cross-petition should have been overruled. The judgment will be reversed and remanded for further proceedings.

Judgment reversed.

WALTERS, J., and MERRIMAN, J., concur.

**EJECTMENT NOT AVAILABLE TO A MORTGAGOR WHERE
CONDITION OF THE MORTGAGE HAS
BEEN BROKEN.**

Court of Appeals for Stark County.

ISAAC STRIPE V. THE NATIONAL FIREPROOFING CO.*

Decided, January Term, 1916.

Foreclosure—Jurisdiction under a Cross-Petition Not Obtained Without Service, When—Rights of Mortgagor and Mortgagee After Condition Broken—Ejectment.

1. Jurisdiction to render judgment on a cross-petition is not conferred by the service had on the petition praying for foreclosure of a mortgage, where the cross-petition was not filed for several months after the entering of a decree of sale on the petition, and did not ask for the sale of the same land as that described in the petition but had reference to a different parcel of land, and the relief sought was not the same but of a different nature, and the co-defendant whom it is sought to hold under the service upon the petition did not enter his appearance under the cross-petition.
2. But a suit in ejectment does not lie upon the petition of a mortgagor, or his heirs and devisees or supposed successors in title,

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 6, 1916.

where the condition of the mortgage has been broken; from which it follows that the defective service in the instant case is without avail to the plaintiff who claims title through the mortgagor.

J. W. Craine and J. W. Jeffers, for plaintiff in error.

Pomerene, Ambler & Pomerene and Kratsch & Maier, contra.

HOUCK, J.

This is an error proceeding in which it is sought to reverse the judgment of the common pleas court of this county. The parties stand here in the same relation to each other as in the court below. The action was one in ejectment and a jury being waived in the court below was submitted to the court on the petition of the plaintiff and the first defense in the second amended answer of the defendant, the National Fireproofing Company, and the amended reply thereto, and an agreed statement of facts. The court below found for the defendant and error is now prosecuted to this court seeking a reversal of the judgment below. The facts necessary for a proper determination of this controversy obtained from the agreed statement of facts are as follows:

“John Stripe was the owner of the northwest quarter of Section No. 31, Township No. 12, Range No. 8, Stark county, Ohio. On June 1, 1864, to secure certain notes John Stripe executed and delivered to Daniel J. Wise a mortgage on the south half of said northwest quarter. Later Daniel J. Wise sold and transferred his notes and mortgages to John H. Wise. John H. Wise died, and these notes and mortgages came into the possession of Oliver P. Shanafelt as his administrator. On April 7, 1877, John Stripe and wife, for the purpose of securing nine promissory notes, executed and delivered to Hiram Stripe a mortgage on the entire northwest quarter, excepting 1.35 acres. This mortgage was the second mortgage on the south half and the first mortgage on the north half of said northwest quarter. On the 8th day of April, 1878, Hiram Stripe transferred his notes and mortgage to Hiram R. Wise. On the 15th day of March, 1878, John Stripe and wife, to secure certain notes, executed and delivered to John Miller a mortgage on the entire northwest quarter, excepting said 1.35 acres, which mortgage was the third mortgage on the south half and the second mortgage on the north half of said real estate.

1916.]

Stark County.

“Oliver P. Shanafelt, as administrator, on the 13th day of May, 1884, commenced an action to foreclose his mortgage on the south half of said northwest quarter making John Stripe, Hiram R. Wise, John Miller et al, defendants, and served all of the defendants with summons excepting John Miller. John Stripe having filed an answer to the petition of Oliver P. Shanafelt, as administrator, said administrator having filed a reply to said answer, the cause came on for hearing on said petition, answer and reply, and on the 2nd day of January, 1885, a decree was rendered in favor of the plaintiff, Oliver P. Shanafelt, as such administrator. At the time of this decree, which was January 2, 1885, Hiram R. Wise had not filed an answer or cross-petition in this case, although the case was started May 13, 1884, and Hiram R. Wise was duly served with summons. On September 11, 1885, being eight months and nine days after the trial and decree entered in favor of the plaintiff, Oliver P. Shanafelt, Hiram R. Wise filed his cross-petition praying to have his mortgage foreclosed not only on the south half but on the north half of said northwest quarter. No summons was issued under this cross-petition, nor did John Stripe enter his appearance. On March 1, 1886, the south half of said northwest quarter was sold under the decree rendered in favor of Oliver P. Shanafelt, administrator, and on March 3, 1886, said decree was confirmed and deed ordered, the purchaser being Hiram R. Wise. On March 1, 1886, Hiram R. Wise obtained a judgment and decree under his said cross-petition. On August 17, 1891, Hiram R. Wise assigned and transferred whatever interest he had in his decree to George W. Crouse, and on December 14, 1895, the north half of said northwest quarter was sold under the Hiram R. Wise decree to George W. Crouse, and on December 16, 1895, the sale was confirmed by the court and said Crouse entered into possession of said premises and continued thus until he sold same to the defendant, the National Fireproofing Company, which was in the actual possession of same at the commencement of the suit in ejectment. That John Stripe on November 16, 1892, executed his last will and testament in which he attempted to devise the real estate in question to certain heirs, and the plaintiff now claims title thereto by said devise and certain deeds conveying the same to him. That said John Stripe departed this life on July 18, 1894, and at said time was in the actual possession of the real estate in question.”

We find from the facts in this case but two questions are presented for determination by the court, and that they are decisive

of this controversy. The first question is, Did the court have jurisdiction over the person of John Stripe in face of the fact that no summons was served on him and there being no waiver of service of summons by him on the cross-petition of Hiram R. Wise? The facts clearly show that the petition upon which service was had did not include the real estate sought to be sold under and by the cross-petition of Hiram R. Wise, but embraced an entirely different parcel of land, and the relief sought in the cross-petition was of a different nature and not the same, and therefore certainly could not bind John Stripe when he had not been served with summons and had not otherwise entered his appearance with reference to the relief sought in the cross-petition.

We feel that our Supreme Court has finally determined this question in the case of *Southward v. Jamison et al*, 66 O. S., 290, the first syllabus being as follows:

“So long as the cross-petition in a case is strictly confined to matters in question in the petition, the summons issued on the petition would be sufficient notice to sustain a judgment rendered on the cross-petition, but when the cross-petition sets up matters which are not drawn in question in the petition, and seeks affirmative relief against a co-defendant of a nature different from that sought in the petition, a summons to the party to be charged issued on the petition will not confer jurisdiction to render judgment on the cross-petition, especially when the cross-petition is filed after the defendant thereto is in default for answer to the petition and a summons on the cross-petition in such case is necessary.”

But we do not think this question is decisive of the real problem to be solved in the case at bar. We hold that it must be determined upon the rights of mortgagor and mortgagee after condition broken, which brings us to the second question in this inquiry. What are the legal rights of the mortgagor and mortgagee of real property after condition in the mortgage is broken? Was the remedy of plaintiff, if he had any, ejectment? We think not. Section 11903 of the General Code of Ohio provides:

“In an action for the recovery of real property, it shall be sufficient if the plaintiff sets up in his petition that he has a legal

1916.]

Stark County.

estate therein and is entitled to the possession thereof, describing it with certainty as to identity, and that the defendant unlawfully keeps him out of the possession." * * *

The plaintiff must allege and prove that he has a legal estate in the real estate of which he seeks to gain possession. Did Isaac Stripe have a legal estate in the real estate in question at the time of the commencement of this suit? Certainly not. He had the title, if any, that John Stripe had in same, and what title did John Stripe have at the time of his decease? Simply the equity of redemption growing out of his rights as mortgagor after the condition in the mortgage had been broken. What are the rights of a mortgagor in the mortgaged premises after the condition in the mortgage is broken?

"A mortgage on real estate is regarded in equity as a mere security for the performance of its condition of defeasance and when that condition is a payment of a debt the security is regarded as an incident of the debt." *Swartz v. Leist*, 13 O. S., 419.

"The mortgage being in equity regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor as against all the world, except the mortgagee, and also as against him until condition broken, but after condition broken the legal title as between mortgagor and mortgagee is vested in the mortgagee." *Allen v. Everly*, 24 O. S., 97; *Hibbs v. Ins. Co.*, 40 O. S., 543-559; *Martin v. Alter*, 42 O. S., 94.

"In our own state the right to foreclose a mortgage after condition broken either by a strict foreclosure or by a foreclosure and sale of the mortgaged property, continued down to the adoption of the Code of Civil Procedure in 1853. By Section 374 of the Code (which is now Section 11588 of the General Code) it is provided that: 'When the mortgage is foreclosed a sale of the premises shall be ordered.' This prohibits a strict foreclosure in this state, and now after condition broken if the mortgagee appeals to the courts to enforce his mortgage he must elect between two remedies, he may sue for the recovery of the possession of the land in a real action in the nature of ejectment, using his mortgage to prove his title, or he may sue for a foreclosure of his mortgage and a sale of the mortgaged premises. After condition broken the title is vested in the mortgagee as between him and the mortgagor, and as the right of the mortgagee to recover the possession of the land by ejectment always existed

at common law and has not been taken away by statute, it still exists in this state." *Kerr et al v. Lydecker, admrx.*, 51 O. S., 249-250.

Applying the above principles of law to the conceded facts in this case we can reach but one conclusion, and that is that the judgment of the common pleas court is right and should be affirmed.

Judgment affirmed.

POWELL, J., and FERNEDING, J. (sitting in place of Shields, J.), concur.

**RUNNING OF MOVING PICTURE SHOWS ON SUNDAY
MAY BE PROHIBITED.**

Court of Appeals for Ross County.

CLARENCE MYERS v. STATE OF OHIO.*

Decided, February 29, 1916.

Sunday Laws—Running a Moving Picture Show is Giving a Theatrical Performance—Contrary to the Statute Relating to Sabbath Desecration.

A moving picture show is a theatrical performance and is prohibited on Sunday by Section 13049, General Code of Ohio.

The plaintiff in error was charged, in an affidavit filed in the mayor's court of Chillicothe, with unlawfully and purposely exhibiting to the public, in a building known as the Majestic Theatre, on East Second street in that city, "a theatrical performance, to-wit, a moving picture show, on the first day of the week, commonly called Sunday."

It appears from the testimony that the defendant was exhibiting a moving picture show on Sunday, the 21st of November, 1915, at the place mentioned in the affidavit; that the name of

*Motion to direct the Court of Appeals to certify its record in this case overruled, April 25, 1916.

1916.]

Ross County.

the picture was "Judith of Bethulia;" that at the time the picture was exhibited there was no scenery used and no music of any kind; that the picture had been approved by the board of censors, in accordance with the law of Ohio, and that tickets were sold in the usual way.

Walter W. Boulger, for plaintiff in error.

John P. Phillips, A. P. Minshall and Garrett Claypool, contra.

SAYRE, J.

The defendant was found guilty of a violation of Section 13049, General Code of Ohio, and the judgment was affirmed by the Court of Common Pleas of Ross County.

Section 13049 reads as follows:

"Whoever, on Sunday, participates in or exhibits to the public with or without charge for admittance, in a building, room, ground, garden or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, base ball playing in the forenoon, ten pins or other game of similar kind, or participates in keeping a low or disorderly house or resort, or sells, disposes of or gives away ale, beer, porter or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or houses or place is kept, on complaint within twenty days thereafter, shall be fined not more than one hundred dollars or imprisoned in jail not more than six months, or both."

The question for determination is, whether a moving picture show is a "theatrical performance."

When the words "theatrical performance" were originally placed in the statute there were no moving picture shows, but at the time of the last amendment, April 26, 1911 (O. L., 102, p. 92), they were common things. The fact that there were no moving picture shows when the statute was originally passed is not decisive of the question. *State v. Cleveland*, 83 O. S., 61.

The argument that the Legislature meant to allow moving picture shows on Sunday because they were not included by

name in the amendment of 1911 is not at all convincing or satisfactory.

The Century Dictionary defines the adjective "theatrical" thus:

"Of or pertaining to a theatrical or scenic representation; resembling the manner of dramatic performances; as, theatrical performances; theatrical gestures."

The same authority defines "performance" thus:

"3. A musical, dramatic or other entertainment; * * *."

It does not require any assembling of facts or arguments to demonstrate that a moving picture show is an entertainment resembling the manner of a dramatic performance. So a moving picture show is within the strict letter of the statute. Is it within the real meaning and spirit of the descriptive terms of the same? Section 13049 is a police regulation, the purpose of which is to fix regular recurring days of rest from certain secular pursuits therein named, and thus to promote the business, health and well-being of society. *State v. Powell*, 58 O. S., 324.

The exhibition of the ordinary picture show is a secular pursuit, just as the old line dramatic performance is, and as base ball playing is. The very object aimed at in the statute was the prevention of the prosecution of these secular pursuits every day.

The two performances differ in the fact that in the picture show moving pictures of persons and things are thrown on a screen, and in the old line dramatic performance the persons and things appear upon the stage. In the former there is absence of the human voice; in the latter the human voice is present. But while these differences and some others are found, the two in many respects are similar. In the moving picture show there are human forms in action, exhibiting fear, terror, courage, cowardice, hope, love, hatred, happiness, sadness, despair, and all the various passions, virtues, vices and human characteristics which are portrayed on the stage by real persons. In the moving picture show situations are represented which draw moral truths, as on the stage by real actors. In the picture show

1916.]

Hamilton County.

there is the same exaggeration of events as portrayed by real actors. The effect upon the audience is substantially the same. In both the moving picture show and the old line dramatic performance the particular thing aimed at is the portrayal of the events and emotions of life, often highly exaggerated and misrepresented, to afford entertainment to the audience.

Further, the moving picture represents to the eye greater, larger and more comprehensive scenic effects than can possibly be produced upon the real stage.

These facts are referred to simply to make plain that the moving picture show is in actual fact a scenic representation, and by the very best authority a scenic representation is a theatrical entertainment or performance.

The judgment of the court of common pleas will be affirmed.
Judgment affirmed.

WALTERS, J., and MERRIMAN, J., concur.

**INSUFFICIENT EVIDENCE TO SUPPORT REFORMATION
OF CONTRACT.**

Court of Appeals for Hamilton County.

MICHAEL J. GIBBONS V. THE J. H. DAY COMPANY.*

Decided, July 19, 1915.

*Contract for Heating Building—Action for Reformation of Contract—
Evidence Insufficient to Warrant Reformation.*

Under the rule that before a contract can be reformed the evidence establishing a mistake must be clear and convincing and must show that the mistake was not that of one of the parties alone but was mutual, the court is unable to grant the prayer for a reformation of the contract in this case.

Littleford, James, Ballard & Frost and Van Deman & Vorys,
for plaintiff.

Clore & Clayton, contra.

*Motion to direct the Court of Appeals to certify its record overruled by the Supreme Court, May 9, 1916.

GORMAN, J.

The action below set out in the petition consisted of three causes. The first was to reform the contract for the heating of the defendant company's plant on Harrison avenue in this city, which contract was entered into between the plaintiff and the defendant.

The contract is in writing, signed on behalf of plaintiff by M. W. Ward, superintendent, and on behalf of the defendant company by J. H. Day as president. At the time of the trial of the case below Mr. Day was dead and Mr. Ward was *non compos*, so that the testimony of neither was available. It is claimed by the plaintiff that there was a mutual mistake in the execution of the contract in that there was omitted therefrom a reference to the plans and specifications, and that the same were to be made a part of the contract.

We have examined the record and considered the briefs of the parties in this case, and we are unable to find that there was a mutual mistake made by the parties. The contract for the heating of defendant company's plant appears to be full and complete, and there is no evidence before us which tends to show that the parties had before them any plans and specifications, or intended to make them a part of the contract either by reference or by attachment to the contract. It is elementary law that in order to warrant a court in reforming a contract, the evidence to establish a mistake must be clear and convincing, and that the mistake was not that of one of the parties alone but was mutual.

We are unable to find from the evidence in this case that there was a mistake made by the parties hereto, and we therefore deny the prayer of the petition as to the first cause of action, which cause of action will be dismissed at the cost of the plaintiff.

The issues made upon the second and third causes of action set out in the petition are not before us, and the case will be remanded to the court of common pleas for further proceedings according to law.

JONES (E. H.), P. J., and JONES (Oliver B.), J., concur.

1916.]

Richland County.

**RELATION OF EMPLOYEE TO EMPLOYING CORPORATION IN
WHICH HE HAS PURCHASED STOCK.**

Court of Appeals for Richland County.

**JOSEPH E. SMITT V. THE AULTMAN & TAYLOR COMPANY AND
THE AULTMAN & TAYLOR MACHINERY COMPANY.**

Decided, January Term, 1916.

Equity—Fiduciary Relation between Employee and Corporation—Where Employee Purchases Stock of the Corporation on Representation That it Can be Paid for Out of Dividends—Company Liable for Failure of Dividends, When—Word “Dividends” Can Not be Used Interchangeably with “Earnings”—Oral Evidence in Explanation of a Written Contract.

1. The rule which permits the giving of oral testimony in explanation of the circumstances surrounding the making of a written contract, does not authorize the varying of the plain terms of the written contract by such oral testimony, unless it be shown that the contract was made through mistake, fraud, surprise or accident; and where the plaintiff is not claiming fraud, or asking that the contract be set aside, but rather that it be enforced in his favor, such oral testimony is inadmissible.
2. Where one who has been in the employ of a corporation for many years and has come to have great confidence in the honesty and business ability of the officers having charge of its affairs, purchases stock from this corporation at the solicitation of these officers in a new corporation organized by these officers for the purpose of purchasing the property of the old corporation, and continuing its business under the control of the officers of the old corporation, and giving his note, secured by the stock thus purchased, to the old corporation in payment therefor in which it is recited that dividends declared by the company are to be applied to its payment, a fiduciary relation exists, and if the confidence so reposed is abused the company would become liable therefor; but this principle does not require that the company shall be held liable for losses growing out of a change in business conditions, or from mistake in judgment on the part of those in control, unless it can be shown they intentionally abused the trust and confidence so reposed in them.

3. A court of equity is without power, in the absence of fraud or abuse of discretion, to require a board of directors to declare dividends, and it follows that no authority exists for declaring paid a note given by an employee for stock, which note was to have been satisfied by application of dividends on the stock but was not so paid because of failure to declare dividends.

Brucker, Voegele & Henkel, for plaintiff in error.

McBride & Wolfe, Harter & Harter and *Pomerene, Ambler & Pomerene*, contra.

POLLOCK, J. (sitting in place of Shields, J.)

This case comes into this court on appeal, and was submitted on the pleadings, the evidence and the argument of counsel.

The plaintiff seeks to have the defendant, the Aultman & Taylor Company, cancel and surrender a note given by him to it for \$5,000, and a re-transfer of fifty shares of the capital stock of the Aultman & Taylor Machinery Company deposited as collateral security.

The pleadings are long, and I will not attempt to state, only in very general terms, the allegations made therein. Plaintiff says that the Aultman & Taylor Company was organized in 1867 for the purpose of manufacturing threshers and threshing engines; that it continued in business to 1891; that its business was very profitable; that in 1891 those holding the majority of stock in that company desired to quit the active business in which it was engaged, and that they organized the Aultman & Taylor Machinery Company, with a capital stock of \$500,000, subscribing for and receiving all of the capital stock of that company; that the Aultman & Taylor Company sold to the Aultman & Taylor Machinery Company all of its property except its notes and accounts receivable; that plaintiff was an employee of the Aultman & Taylor Company at the time of the organization of the later company, and had been for many years prior to that time, and that, by representations of the Aultman & Taylor Company, he was induced to purchase from that company fifty shares of the capital stock of the Aultman & Taylor Machinery Company, giving in payment therefor his note for

1916.]

Richland County.

\$5,000 and depositing the stock as collateral security, with a condition in the note that he was to apply all dividends declared on this stock to the payment of his note.

He further alleges that the Aultman & Taylor Company has always owned a majority of the capital stock of the Aultman & Taylor Machinery Company, and that it has controlled the election of directors of that company and its management; that in fraud of plaintiff's rights it has refused to permit dividends to be declared on the capital stock of the Aultman & Taylor Machinery Company, and in fraud of plaintiff's rights it has engaged in other business not contemplated at the time plaintiff purchased his stock.

He further alleges that the earnings of the Aultman & Taylor Machinery Company have been very large, setting out the earnings as shown by the statement of that company each year, and alleging that the Aultman & Taylor Company has prevented dividends to be declared by the Aultman & Taylor Machinery Company.

He prays that the Aultman & Taylor Machinery Company be compelled to declare dividends of all its earnings, as of the date when the same should have been declared, and that all the earnings of the company, or enough to pay the same, be applied upon the note of the plaintiff now held by the Aultman & Taylor Company, and that said note be canceled and held for naught, and that the Aultman & Taylor Company be compelled to immediately surrender to plaintiff the stock held by it as collateral, and for other and proper relief.

The two defendants filed separate answers which admit the organization of both companies, and many of the allegations of the petition, but deny all allegations of fraud or fraudulent practice, and deny plaintiff's right to have said note canceled and the stock surrendered; and the Aultman & Taylor Company, as a cross-petition, asks for a judgment on the note and an order to sell the stock held by defendant as collateral security. The plaintiff, in his brief, says that he is not insisting upon any relief or order directed against the Aultman & Taylor Machinery Company.

The note, which the plaintiff asks to be canceled and the stock deposited as collateral security therefor surrendered to him, reads as follows:

“MANSFIELD, OHIO,
October 1st, 1891.

“No. \$5,000.

“On or before October 1st, 1906, the undersigned promises to pay to the Aultman & Taylor Company or order five thousand (\$5,000) dollars for value received, with interest at 6%, payable annually, and has deposited with the Aultman & Taylor Company as collateral security shares of stock in the Aultman & Taylor Machinery Company of Mansfield, Ohio, with authority to sell the same at public or private sale, at its option, on the non-performance of this promise and without notice, applying the net proceeds to the payment of this note, including interest, and accounting to the undersigned for the surplus, if any. In case of deficiency the undersigned promises to pay to the Aultman & Taylor Company the amount thereof, forthwith after such sale, with legal interest. The Aultman & Taylor Company agrees not to sell the stock above described before October 1st, 1906, and the undersigned agrees to apply all dividends paid by the Aultman & Taylor Machinery Company to the payment of the principal and interest of this note as fast as such dividends are declared. The undersigned agrees that with such dividends (supplemented if necessary by cash payments) the principal of this note shall be paid off, beginning October 1, 1896, at the rate of not less than 10 per cent. each year.

“JOSEPH E. SMITT.”

The plaintiff in the trial of this case seems to abandon his right, as stated in the prayer of the petition, to have dividends declared by the Aultman & Taylor Machinery Company, as of the date that he claims the earnings were made and applied to this note, but claims, first, that the contract as intended by the parties was that all the earnings of the Aultman & Taylor Machinery Company were to be credited upon this note from time to time as they were made by the Aultman & Taylor Machinery Company, whether these earnings had been declared as dividends or not; and, further, that, as the Aultman & Taylor Machinery Company soon after its organization went into the manufacture of what is denominated “the large boiler business” and con-

1916.]

Richland County.

tinued for a number of years in this business, which they claim was not contemplated at the time of the giving of this note, or rather that the Aultman & Taylor Company had promised and agreed that the Aultman & Taylor Machinery Company would only engage in the business that had formerly been engaged in by the Aultman & Taylor Company, that the engaging in this boiler business was a constructive fraud on this plaintiff and, as there were large losses made, the Aultman & Taylor Company should be required to bear plaintiff's proportion of that loss and that that proportion should be credited on the note for the reason that the Aultman & Taylor Company dictated the policy of the Aultman & Taylor Machinery Company by electing its directors.

On the trial of this case the plaintiff introduced the testimony of himself and, in order to substantiate these claims, he testified to conversations with M. D. Harter, who represented, in the sale of this stock to plaintiff, the Aultman & Taylor Company. This testimony was to the effect that during the conversation of plaintiff with Harter in regard to the subscription for this stock, plaintiff was assured by Harter that the Aultman & Taylor Machinery Company would not engage in any other business except that which had been conducted by the Aultman & Taylor Company, and also that the earnings of the Aultman & Taylor Machinery Company would be declared in dividends and applied on the plaintiff's note, and that plaintiff would not be called upon to pay any of the principal and interest of this note. This testimony was objected to by the defendant and taken under objection.

The claim of the plaintiff is that this testimony is competent under the rule that written contracts may always be read in the light of surrounding circumstances. *Masters v. Freeman et al*, 17 Ohio St., 323. This is a rule of universal application in the construction of written contracts, but the rule that oral testimony is not admissible to contradict or vary the terms of a written instrument is equally as well supported. *Thompson on Ohio Trial Evidence*, Section 405. The sections following and the cases cited thereunder will illustrate the first rule as to when

oral testimony can be given in explanation of the circumstances surrounding the making of a written contract. But this does not authorize the varying of the plain terms of a written contract by oral testimony. This author, of course, refers generally to actions at law, but we think there is no variance from the rule in actions in equity, except where the contract is induced to be made through mistake, fraud, surprise or accident. *Pomeroy's Equity Jurisprudence*, Section 858.

In the present case it is not claimed that there was any mistake or fraudulent representations made by the Aultman & Taylor Company to induce plaintiff to enter into this contract, but all the representations were made in good faith. And the plaintiff is now not asking that the contract be set aside, but he is asking that it be enforced in his favor. We do not see how, under these rules, any statements that were made by the representative of the Aultman & Taylor Company, at and before the making of the contract, which tend to vary its terms, can be proven by oral testimony. For this reason we think that the exceptions to all the oral testimony as to the statements made by Mr. Harter at and prior to the time of the making of the contract should be excluded.

The plaintiff further claims that, by reason of his being in the employment of the Aultman & Taylor Company for many years before the organization of the other company, and his confidence in the business ability and management of those having control of the Aultman & Taylor Company, and the success of that company, a fiduciary relation existed between himself and the Aultman & Taylor Company in entering into this contract for the purchase of the stock of the Aultman & Taylor Machinery Company.

A fiduciary relation exists between parties when one party is placed in charge of the person or property, or both, of another, through legal proceedings; and it may exist between parties in a contractual relation where one party, with the knowledge of the other, places confidence and trust in the honesty and judgment, or both, of the other, and this is known to the other party by reason of some former relationship or dealings that give the one

1916.]

Richland County.

the right to rely upon the other. This rule is very aptly stated in *Pomeroy's Equity Jurisprudence*, Section 956:

“Wherever two persons stand in such relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached if no such confidential relation had existed.*”

And the Supreme Court of this state has announced this principle, as follows:

“1. The principle that a party is responsible for false representations of material facts, applies to all those cases where influence is acquired and abused, or confidence is reposed and betrayed.” *Smith v. Patterson*, 33 Ohio State, 70.

We think that this relation did exist, under the principles just referred to, between the plaintiff in this case and the Aultman & Taylor Company in the entering into this contract for the purchase of the stock, and also in the carrying out of the contract for the payment of the note given for the purchase money. Mr. Smitt relied upon the good faith and the business judgment of those in charge of the Aultman & Taylor Company in the management of the Aultman & Taylor Machinery Company in order to pay his obligation to the first company, and if this confidence was abused or intentionally taken advantage of, the company would be liable to the plaintiff in some way therefor. But the rule does not require that the Aultman & Taylor Company should be held responsible, either in equity or in law, for mistakes in the management of the Aultman & Taylor Machinery Company by which loss was incurred, unless they intentionally abused this trust and confidence.

The testimony shows that shortly after the organization of the Aultman & Taylor Machinery Company, the board of directors of that company went into what is denominated in the trial of

this case "the construction of large boilers." While this business at first seems to have been profitable, yet from that on it is admitted that the business was not profitable and was finally disposed of at a loss. It is admitted that this business was not contemplated at the organization of the Aultman & Taylor Machinery Company, but it was within the provisions of the charter of that company.

Now, the plaintiff insists that the Aultman & Taylor Company should be required to credit on his note his proportionate amount of that loss, for the reason that it held a controlling amount of the stock and that it cast its vote at the election of directors of the Aultman & Taylor Machinery Company for the directors that were elected, and that they were under the control and management of this company.

There is no testimony tending to show that the Aultman & Taylor Company, either in the respect complained of or in any other respect, acted in bad faith in the management of the Aultman & Taylor Machinery Company. There is no complaint that the board of directors elected were not competent and honest, and there is no testimony tending to show that those in charge of the Aultman & Taylor Company or the directors of the Aultman & Taylor Machinery Company, when the latter company engaged in the boiler business, had any other motive than that of the best interests of that company. They believed that the business in which they then embarked would prove profitable and advantageous to their company, and this belief was acquiesced in by the Aultman & Taylor Company, and there is no evidence tending to show but what both exercised their best judgment in this matter, and they are not chargeable with any loss that afterwards occurred.

The plaintiff trusted to their judgment and skill, and he received what he trusted in, and the Aultman & Taylor Company are not responsible for any loss that occurred by reason of this misjudgment, if it was such, but the loss is perhaps better attributed to a change of business conditions.

It is further urged that the true intent and meaning of the note or contract signed by the plaintiff, providing for the apply-

1916.]

Richland County.

ing of dividends declared on the stock of the Aultman & Taylor Machinery Company to the payment of the note, was that whenever any earnings were made by the Aultman & Taylor Machinery Company the proportionate part should be applied to the discharge of this obligation, regardless of the fact that no dividends were declared, and if the amount had been applied each year, as the company's statements show the earnings were made, it would have paid the note prior to this, and for that reason the defendant should be required to surrender it.

It is urged that this construction was placed upon this contract or note by the Aultman & Taylor Company at its meeting in January of 1898. At that meeting there was a resolution passed by the Aultman & Taylor stockholders reciting that the earnings of the Aultman & Taylor Machinery Company had not come up to the hope and expectation of the Aultman & Taylor Company, and this company made the offer then to plaintiff, and others, who held stock under similar contracts to surrender their stock to this company and they would surrender the note and cancel the contract. It is claimed that by reason of the Aultman & Taylor Company in this resolution using the word "earnings," that this contract or note should be construed to mean "earnings" in place of "dividends."

Dividends are declared by a corporation from its earnings. When the earnings did not reach the hope and expectation of the Aultman & Taylor Company, no dividends could be declared thereon. The company, in making its offer to cancel the contract between the plaintiff and it, used the word "earnings," but this resolution in no way tended to place a different construction upon this contract or note than is gathered from its plain reading.

The contract entered into between the plaintiff and the Aultman & Taylor Company, in regard to how this note should be paid, is too plain to apply all dividends paid by the Aultman & Taylor Machinery Company to the payment of principal and interest of this note as fast as such dividends are declared. This is the plain provision of this contract, and equity does not permit courts to make other or change plain provisions of a contract.

Our attention has been called to the maxim: "Equity considers that done which ought to be done."

If payment of this note had actually been received by the Aultman & Taylor Company, equity would apply that maxim and cancel the note without inquiring whether it was received through dividends or other provisions of this note or not.

But there is another maxim of equal importance, that, "He who seeks equity must do equity."

"The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy." *Pemeroy's Equity Jurisprudence*, Section 385.

The plaintiff can not demand the surrender of this note in equity from the Aultman & Taylor Company, until he has paid the consideration as provided by that note, or in some other manner which is its equivalent. There is no claim that the note has been paid, or anything paid thereon except the dividends of eight and six per cent., made in the first years of the Aultman & Taylor Machinery Company's existence. While the earnings of this company are very large at the present time, yet from the testimony as to their manner of doing business it would be disastrous to the credit of the Aultman & Taylor Machinery Company to require it to declare a dividend from its earnings at the present time.

There can be no question about the rule that a court of equity has no right to require the directors of a corporation to declare dividends in the absence of fraud or abuse of discretion upon the part of the board of directors. *Cook on Stock and Stockholders*, Section 545. In fact, the plaintiff does not claim the right to require the Aultman & Taylor Machinery Company to declare a dividend at this time. In the absence of that right we feel that the court of equity has no power to declare the note canceled and the surrender of the collateral security.

1916.]Richland County.

The Aultman & Taylor Company are asking for an order directing the sale of plaintiff's stock held as collateral security. The conditions under which this stock was deposited have been broken, and the defendant company has a right to have such an order.

As the Aultman & Taylor Company, in its brief, authorizes the court to mould its judgment in such a way that no judgment for a personal liability in its favor against the plaintiff may be had, the judgment may be that the defendant, the Aultman & Taylor Company, may have a finding against the plaintiff for the amount due upon its note, and an order of sale of the stock deposited as collateral security, but no personal judgment against the plaintiff for the remainder, if any, unpaid of the amount of the note after the application of the selling price of the stock.

The costs made in the court of common pleas will be adjudged against the defendant, the Aultman & Taylor Company. Those made in this court will be adjudged against the plaintiff. Exceptions noted for plaintiff. If plaintiff files a motion for a new trial, it is overruled, and exceptions noted.

HOUCK, J., and SPENCE, J. (sitting in place of Powell, J.), concur.

AS TO THE LOCATION OF GATES AT A GRADE CROSSING.

Court of Appeals for Ross County.

**THE CHILLICOTHE ELECTRIC RAILROAD, LIGHT & POWER COMPANY
v. NORFOLK & WESTERN RAILWAY COMPANY ET AL.**

Decided, February 29, 1916.

Grade Crossings—Location of Safety Gates—Presumption that When Gates Have Been Placed it Has Been Done in Accordance With the Order of the Public Utilities Commission.

1. By the provisions of Section 588, the Public Utilities Commission has authority to order the erection of a gate where the tracks of a railroad cross a public street at grade, but such gate can only be lawfully ordered erected at such crossing.
2. Such commission, being an administrative body, is presumed to know whether its order has been obeyed, and in the absence of a suit by it to enforce such order the courts will presume that in the opinion of the commission its order has been obeyed.
3. When the commission has ordered a gate placed at such crossing, and it has taken no steps under the provisions of Section 614-67 (Section 70) to enforce such order, the courts will conclude that in the opinion of the commission the gate has been located at the crossing and that such location of the gate is the order of the commission, and hence the provisions of Section 549 (Section 38), 103 O. L., 816, divest the court of common pleas and the court of appeals of jurisdiction to restrain the erection of such gate at such location on the ground that the gate was not located at the crossing.

L. B. Yaple and John P. Phillips, for plaintiff.

Henry Bannon and Lyle S. Evans, contra.

SAYRE, J.

The plaintiff brought suit in the court of common pleas, seeking an injunction to restrain the defendants from erecting a gate on East Main street in the city of Chillicothe, Ohio, at the intersection of such street and the track of the defendant, Norfolk & Western Railway Company. The railway company was undertaking to carry out an order made by the public utilities

1916.]

Ross County.

commission of Ohio, directing it to erect a gate at such crossing.

Main street in Chillicothe runs east and west. The railroad tracks crossing such street are so located that if each end of the gate was placed the same distance from the rail farthest west and parallel to it, the gate would extend in a northwesterly and southeasterly direction. The railway company, for supposed convenience and safety to teams and automobiles using Main street, located the end of the gate on the north side of the street about seven feet west of the west rail and the south end about seventy feet west of such rail so that the gate would stand on a north and south line or at right angles to the sides of Main street.

The plaintiff operates a street railroad in Chillicothe and its east-bound cars on Main street are brought to a stop very near the railroad tracks, but do not cross the same. The railroad station used jointly by the Baltimore & Ohio Southwestern and Norfolk & Western companies is southeast of the place where the tracks cross Main street, and if the gate in question was located parallel with the west rail of the tracks, as above described, the cars of the plaintiff can approach so near the railroad tracks that passengers alighting at the station can see such cars; but if the gate was placed at right angles to the sides of Main street, as above described, the cars must stop farther west and can not be seen by passengers when alighting at the station; and it is claimed by the plaintiff that because passengers can not see its cars at that time they take other means of conveyance into the city of Chillicothe and thus the plaintiff loses a large amount of traffic.

The plaintiff brought this action for an injunction on the ground that the order of the public utilities commission was not being obeyed, in that the gate was not being erected at the crossing. The order of the commission directs that the gate be placed at the crossing. The defendants claim that the gate was being erected at the crossing. Defendants claim they were obeying the order of the commission. Plaintiff claims they were disobeying it.

Section 614-67 (Section 70) provides that:

“Whenever the commission shall be of the opinion that any public utility or railroad has failed, omitted or neglected to obey any order made with respect thereto, or is about to fail or neglect so to do, or is permitting anything, or about to permit anything contrary to, or in violation of law, or an order of the commission, duly authorized under the provisions of this act, the Attorney-General, upon the request of the commission, shall commence and prosecute such action, actions, or proceedings in mandamus or by injunction in the name of the state, as may be directed by the commission, against such public utility or railroad, alleging the violation complained of and praying for proper relief, and in such case the court may make such order as may be proper in the premises.”

By the provisions of this section the commission has a complete remedy to enforce its orders, and we conclude that this is the exclusive remedy for enforcing the orders of the commission. No other person or persons can maintain a suit to enforce such order on the theory that an order of the commission has not been obeyed.

The commission being an administrative body, it is its business to know whether its order has been obeyed, and so long as the commission takes no steps to enforce its order the courts must conclude that in the opinion of the commission its order is being or has been obeyed.

Section 549 (Section 38), 103 O. L., 816, provides:

“No court other than the Supreme Court shall have power to review, suspend or delay any order made by the commission or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties.” * * *

Plaintiff's contention is that it is not, by this suit, seeking to delay any order made by the commission or to enjoin, restrain or interfere with the commission in its official duties, but rather that it is aiding the commission in the performance of its duties by seeking to enjoin the disobedience of the order of the commission because it claims the defendants are not erecting the gate at the crossing where the commission ordered the gate to be erected.

1916.]

Hamilton County.

But it is clear that if the gate is located where the commission intends it shall be located then such location is the order of the commission.

The court will presume under all circumstances, except in case the commission brings an action to enforce its order, that in the opinion of the commission the order is being obeyed and that where an order issued by the commission is being executed that such execution is in accordance with the order and direction of the commission.

The court, therefore, concludes that the location of the gate at right angles to the sides of Main street, as above described, is in accordance with the order of the commission and that such location is its order.

It is clear then, if we are free from error in the conclusion reached, that neither the court of common pleas nor the court of appeals has any power to entertain the present suit, and that each is wholly without jurisdiction in the premises.

The petition will therefore be dismissed.

WALTERS, J., and MERRIMAN, J., concur.

VALIDITY OF LONGVIEW HOSPITAL BOND ISSUE.

Court of Appeals for Hamilton County.

STATE OF OHIO, ON THE RELATION OF JOHN V. CAMPBELL, PROSECUTING ATTORNEY, v. FRED E. WESSELMANN ET AL.*

Decided, April 3, 1916.

County Bonds—Validity of Issue of—For Enlargement of an Insane Asylum Where Issue Has Been Authorized by the Electorate—How Proceeds May be Expended.

Injunction does not lie against an issue of bonds, put forth by county commissioners for improvements in an insane asylum owned by the county, where the issue has been approved by the people and the proceeds are disbursed in accordance with the statutory provisions.

*Affirming, *State, ex rel Campbell, v. Wesselmann et al*, 18 N.P.(N.S.), 564.

Campbell, Hickenlooper, Hauck & Capelle, for plaintiffs in error.

Herman P. Goebel, contra.

BY THE COURT.

The commissioners of Hamilton county have the authority to provide for the issue of bonds for the construction, enlargement and repair of buildings for Longview Hospital under Section 2434, General Code, after first submitting the question of such issue to the voters of the county and receiving their approval in compliance with Section 5638, *et seq.*, General Code.

The proceedings for the issue of bonds in the sum of \$300,000 for such purpose, which are attacked in this action, are regular and valid, and fully comply with all the requirements of the law.

So much of the proceeds of these bonds as are issued for the purpose of constructing new buildings can only be disbursed and expended by a building commission to be constituted and controlled under the provisions of Sections 2333 to 2342 inclusive, General Code; and the amount used for the repair of existing buildings must be disbursed and expended by the board of directors of Longview Hospital.

The judgment of the court of common pleas is affirmed.

1916.]

Hamilton County.

**TENANT HOLDING OVER BECOMES LIABLE FOR
YEAR'S RENT.**

Court of Appeals for Hamilton County.

MARTIN J. RICKARD v. JAMES W. UTTER.

Decided, February 14, 1916.

Landlord and Tenant—Latter Holds Over on Promise of Repairs, and Becomes Liable for Year's Rental—Retention of Key by Landlord Not an Acceptance of Surrender, When.

1. Where a tenant by the year holds over, and thereafter there are negotiations regarding a new lease but none is executed, the negotiations regarding the new lease in no way operate to relieve the tenant from the obligation for another year's rental which he assumed by holding over.
2. Failure on the part of a landlord to make promised repairs does not release the tenant from the obligations of his lease, but his remedy is by way of an action for damages for failure to carry out the agreement to make repairs.
3. Retention by the landlord of the key to the premises sent to him through the mail does not constitute an acceptance of the surrender of the lease.

*A. R. Hoffman and Powell & Smiley, for plaintiff in error.
Hunt, Bennett & Utter, contra.*

CHITTENDEN, J.

This action was begun in the Municipal Court of Cincinnati by James W. Utter to recover from the defendant, Martin J. Rickard, an amount claimed to be due upon a lease of real estate. The facts are substantially as follows:

On February 9, 1910, the plaintiff and the defendant entered into a written lease for a residence belonging to the plaintiff, for one year from February 15, 1910, with the privilege of renewal for one year. The defendant agreed to pay therefor the sum of \$50 per month, payable each month, beginning March 15, 1910. At the expiration of the first year the defendant exercised his option of renewal and remained another year. Without any further agreement, he continued in the occupancy

of the property for the third year, and, without any further arrangement being made, he entered upon the fourth year. Some time in March, 1913, probably about the 9th of the month, pursuant to an invitation from the defendant, the plaintiff went to the leased premises and there discussed with the defendant certain repairs that were desired, and agreed that such repairs would be made. At the same time there was a discussion concerning the executing of a new lease, and the defendant testifies that he agreed to execute a new written lease for one year from April 1, 1913, upon condition that the repairs that had been agreed upon should be made within a reasonable time. The evidence is not in conflict, on any material matter, as what was stated on this occasion, the plaintiff, however, claiming that while he agreed to make the repairs desired, the making of such repairs was not a condition to the executing of the new lease. At any rate, the plaintiff very shortly thereafter had a lease prepared in duplicate, for one year from April 1, 1913, and signed the same and sent them to the defendant. The defendant says that when he examined the lease he discovered that there was no condition in it relating to the repairs that had been agreed to be made, and thereupon he retained possession of the lease until he found that the repairs were not being made within a reasonable time, when he returned the lease to the plaintiff; and, on April 30, 1913, wrote to the plaintiff, saying that he had purchased a house and that he would vacate the premises to the plaintiff by the middle of the next month. He in fact did vacate the premises before the middle of May, and, on the fourteenth day of May, sent to the plaintiff a check for the rent due on the fifteenth day of May, and also enclosed with the check a key to the premises.

The plaintiff testifies that he acknowledged receipt of the check and advised the defendant that he would hold him for the remainder of the year, that is, until the 15th day of February, 1914. The defendant denies receiving any such letter. The plaintiff testifies that he did then take possession of the house, and made necessary repairs and used every reasonable means to obtain a tenant, but that he was unable to do so prior to

1916.]

Hamilton County

February 15, 1914. It is the rent, at the agreed rental, from May 15, 1913, to February 15, 1914, that the plaintiff seeks to recover.

It should be added that at the conference between the plaintiff and the defendant on March 9, 1913, it was understood that Mrs. Utter should call upon Mrs. Rickard soon and determine just what repairs were required by Mrs. Rickard. Mrs. Rickard does not testify, but Mrs. Utter testifies that she did call upon the wife of the defendant and went over the matter of repairs, and that Mrs. Rickard stated that because of their having a small baby in the house, she did not want the repairs undertaken until the first of May. We think this statement of facts is sufficiently full to show the questions involved.

The case was tried to a jury in the municipal court, and upon motion made by the plaintiff at the close of all the evidence, court directed a verdict in favor of the plaintiff for the amount claimed by him. Upon proceedings in error in the common pleas court the judgment entered on such verdict was affirmed.

This court is of opinion that the judgment is right, and that the facts would not justify any other conclusion, and that, upon the ground that substantial justice has been accomplished, the judgment should be affirmed.

A majority of the court are of the opinion that the judgment should be affirmed upon the additional ground that there is no evidence on behalf of the defendant tending to establish a legal defense to the claim of the plaintiff.

The law as to the effect of holding over under the terms of a written lease is so well settled in this state that the authorities need not be reviewed or even cited. We find that when the defendant held over after February 15, 1913, he became bound for another year in accordance with the terms of the original written lease. Thereafter a new lease for a different term was proposed and in fact agreed upon, but it was never consummated by the proper execution of the new lease by both parties, or by any change of possession that could be referable to that lease. In fact, the defendant does not assert that he is bound

by the terms of the new lease. We are unable to see that the negotiations with reference to the new lease is any way operated to excuse him from the obligation that he was under for the year beginning February 15, 1913.

The evidence sufficiently explains the reason why the repairs were not made before May 1, and before that date arrived the defendant had written the letter in which he stated that he was about to vacate the premises. Even if the repairs were not made before May 1, as the defendant seems to claim they should have been, the failure to make the repairs would not operate to release the defendant from the obligations of his lease. He might have some remedy by way of an action for damages or otherwise for the failure to carry out the agreement to make repairs, but certainly such failure would not violate the terms of a lease that was in effect before the agreement to repair was made.

It is claimed that there was an acceptance of the surrender of the lease by retaining the key that was sent to the plaintiff through the mail. We can not accept this claim. One can not escape the obligations of a lease merely by sending a key to the lessor through the mail, or leaving it under the door; nor is the lessor bound, under such circumstances, to return the key, which would, no doubt, be returned to him again. Parties are not obliged to pass keys, or other emblems of title or possession, back and forth in order to assert their legal rights to leased premises.

For the reasons stated, the judgment of the common pleas court will be affirmed.

RICHARDS, J., and KINKADE, J., concur.

1916.]

Cuyahoga County.

**AFFILIATION OF PUBLIC SCHOOL TEACHERS WITH A
LABOR UNION.**

Court of Appeals for Cuyahoga County.

J. M. H. FREDERICK V. JOHN G. OWENS.

Decided, June, 1915.

Schools—Appointment of Teachers in the Public Schools—Will Not be Interfered with by the Courts, When—Teachers Without Vested Rights After the Period of their Employment Has Ended—Are Not Disqualified by Affiliation with a Labor Union—Affidavit Charging a Judge with Bias and Prejudice—Disqualifies Him from Sitting in the Case—Contempt Proceedings Before One so Disqualified are Without Validity—Section 1687.

1. The management of the public schools of a city is vested in the superintendent and board of education, and their decision as to the policy to be pursued in the employment of teachers will not be interfered with by the courts in the absence of a showing of fraud or abuse of discretion.
2. In the appointment of teachers the superintendent and board of education are authorized to employ whomsoever they will from among those having the necessary certificates and giving preference to teachers whose terms are expiring. Such freedom of contract is guaranteed by the Constitution, and where the board adopts a resolution providing, among other things, that no applicant for position of teacher in the public schools will be given appointment who is affiliated with a labor organization, the discretion so exercised is within the authority vested in the board.
3. An order of court attempting to control the discretion of the superintendent and board of education in the appointment of teachers, and enjoining them from refusing to appoint applicants for the position of teacher because such applicant is affiliated with a labor organization, or intends to become affiliated with such organization, or has participated, or intends to participate, in forming a union of the teachers of the schools, is beyond the power of the court and is a nullity, and the court is without power to punish a violation of such order in a proceeding for contempt.
4. The judgment and finding of the trial court in this case, that the superintendent of schools had violated the order of injunction, is not supported by the evidence and is contrary to law.
5. An affidavit charging the existence of bias and prejudice, definite and positive in its statements and filed in due time, disqualifies the trial judge under Section 1687, General Code, as

amended, 103 O. L., 417. The evidence of bias and prejudice on the part of the trial judge is so clearly manifest by the record and opinion in this case that this court would set aside the judgment and finding on this ground alone if none other existed.

6. The fact that a judgment involving the liberty of an individual is void will, when shown, constitute a good defense in his behalf, even though the judgment be one which can not be reversed by proceedings in error, and it is immaterial whether the judgment be void for want of jurisdiction to hear the case or because of want of power to enter the judgment.
7. Teachers have no vested rights in positions held by them in the public schools, and their rights terminate at the end of the period for which they were employed.

John N. Stockwell, City Solicitor, and *D. C. Westenhaver*, for plaintiff in error.

John A. Cline and *J. E. Mathews*, contra.

KINKADE, J.

On error to common pleas court.

A few years ago some of the teachers in the public schools of Cleveland formed an organization known as the Grade Teachers' Club. The club was formed to promote the interests of the members as teachers, and for the betterment of the system of teaching in general. One of the main purposes of the club was to secure higher wages for the teachers, another was to correct certain methods pertaining to the school system that were claimed to be erroneous and unnecessarily burdensome to both pupils and teachers. The club selected for its members the usual officers and committees, including an executive committee and a press committee, the plan being to direct the attention of the public to the claims of the teachers.

For the purposes of this opinion, we need refer only to the two objects of the club mentioned, and chiefly to the matter of increase of salaries for the teachers.

After the club had given the question of salary consideration and attention for a few years, without securing satisfactory results, the club considered the question of affiliating with the Federation of Labor of Cleveland, and through that body with the American Federation of Labor, to the end that the club might thereby bring to its assistance the influence of these power-

1916.]

Cuyahoga County.

ful union labor organizations and, with the power of the club thus supplemented, thereby be able to secure from the board of education higher salaries for the teachers.

This plan of affiliating with union labor, for the purpose mentioned, was discussed in the club and in various committee meetings. Distinguished leaders of union labor were invited to and did address the club, advising the carrying forward of the plan proposed. Full and free discussion was engaged in by members of the club, many favoring and others opposing the plan. Full publicity was given in newspapers of all that was taking place. By a very large majority of the members, the club voted to approve the plan.

The board of education thereupon determined that the plan adopted by the club, as stated, would, if carried out, be detrimental, instead of beneficial, to the schools of Cleveland, and pursuant to this decision the board passed a resolution disapproving of the action of the club and calling upon all teachers who were members of the club, who desired to remain as teachers in the schools, to abandon the plan. The board decided, and so resolved, that participation by teachers in the plan of affiliating with union labor, as stated, at any time while teachers, would be treated as equivalent to a resignation by the teachers; that all future contracts or appointments to teach should contain a stipulation to this effect, and that no teacher should be appointed or reappointed who did not freely first assent to these requirements of the board.

The superintendent of schools, J. M. H. Frederick, was directed by the board of education to notify all teachers of this decision of the board and to act in accordance with the resolution in making appointments or reappointments of teachers. The teachers were so notified by the superintendent. All these facts were fully discussed in the teachers' club and in the newspapers of the city. At this stage of events John G. Owens, a tax-payer of the city of Cleveland, filed a petition in the court of common pleas, setting forth the foregoing facts and averring, among other things, that said resolution adopted by the board of education was null and void and an abuse of discretion on the part of the members of the board, and that the carrying out

of the resolution would accomplish a great wrong against the teachers, pupils, tax-payers and citizens of Cleveland in general, by needlessly throwing out of employment a large number of experienced and competent teachers whose places could not be filled by others equally competent, all of which, Owens averred, would result in throwing the whole school system into a confused and chaotic condition and incur an unwarranted increase in the expenditure of public money made necessary to meet these unusual conditions, all to the great and irreparable damage of Owens and the other tax-payers of Cleveland, for which no remedy at law existed. An injunction was prayed for against the board of education and the superintendent of schools to prevent the carrying into effect of the resolution.

The board of education and the superintendent filed an answer to the petition, admitting the passage of the resolution and denying that the enforcement of the resolution would in any wise produce the results set forth in the petition. The answer denied that the board was abusing its discretion or was in any wise acting in an unlawful manner.

The common pleas Judge, Honorable W. B. Neff, who had heard the application for an injunction shortly prior to the close of the school year of 1914, found, on June 22, 1914, that the allegations of the petition were true; that the resolution adopted by the board of education was null and void; and, so finding granted the prayer of the petition and issued an injunction in these words:

“The board of education of the city school district of the city of Cleveland, and J. M. H. Frederick, are perpetually enjoined from enforcing said resolution and carrying the same into effect; that said defendants are enjoined from refusing to appoint, reappoint or confirm any applicant for a position of teacher in the schools of said school district, because such person is affiliated with any labor organization, or intends to become affiliated with any labor organization, or because any such applicant has participated in or intends to participate in any effort to form a union of the teachers of the schools of the said district.”

The board of education thereupon gave notice of an intention to appeal the case to the court of appeals and attempted to per-

1916.]

Cuyahoga County.

fect the appeal. The omission to file an appeal bond resulted in the appeal being dismissed by the court of appeals, and this action by the court of appeals was affirmed by the Supreme Court.

Thereafter, six, and only six, out of the several hundred teachers, members of the Grade Teachers' Club, a very large majority of whom had, as stated, been active in urging affiliation by the club with union labor organization, failed of reappointment as teachers for the next ensuing year.

The superintendent or his assistants interviewed these six teachers, respectively, prior to the final closing and making public of the full list of teachers for the coming year.

The evidence found in the record discloses some conflict between these teachers and the superintendent and his assistants as to what was said by each at these interviews. Following the interviews, these teachers, assuming, as they did, that the door had been closed against them, gave interviews to a newspaper in which the conduct of the superintendent and his assistants, as well as the school-teaching system in general, under their management, was freely discussed and sharply criticised.

The superintendent claims that prior to the time these teachers gave these interviews to the newspapers, he had not finally determined against their reappointment. The superintendent and his assistants claim these six teachers were told at these interviews that they were out of harmony with their superiors in the management of the schools, and that unless their attitude in this respect was altered, they would not be reappointed.

These six teachers at the same time wrote six letters, one each, all substantially alike in terms, to the superintendent, promising harmonious co-operation with their superiors if reappointed for the coming year. It is admitted by one of the counsel for Owens, that these six letters were prepared under his instruction and were all sent at one time and in one package from his office to the office of the superintendent of schools, Mr. Frederick. It was stated by the counsel under whose direction these letters were written and sent that they were so prepared and sent to test the good faith of the claim on the part of the superintendent that he was insisting only upon harmonious co-operation by teachers with their superiors.

These six teachers were claiming and giving it out to the public through the newspapers that they had been, or were about to be, denied reappointment on the ground that they had been active in urging affiliation of the members of the teachers' club with union labor organizations as stated.

The claim of the superintendent was and is that these six duplicate letters, coming in one package from the attorney representing the teachers, were no evidence of good faith and a harmonious spirit on the part of the teachers, but were a mere subterfuge put forward to secure reappointments.

When it became definitely and finally known that these six teachers had failed of reappointment, Owens, who secured the injunction, filed in court on September 9, 1914, a charge against superintendent Frederick, alleging the following:

"That the defendant, J. M. H. Frederick, is guilty of disobedience of, and resistance to, a lawful order, judgment and command of this court, to-wit, the judgment rendered by this court in this cause on the 22d day of June, 1914. Said disobedience of and resistance to said judgment consists in this, to-wit: that on or about the 21st day of June, 1914, * * * said defendant, J. M. H. Frederick, * * * did refuse to appoint, reappoint or confirm the following persons, who, at that time and prior thereto, were and have been applicants for the position of teacher in schools of said school district, to-wit: (naming said six teachers); that each of said teachers had served creditably in the schools of said school district for long periods of time, varying from ten to twenty-five years, and had been commended for their fidelity and competency not only by the incumbents of the superintendent's office preceding the defendant Frederick, but by said defendant Frederick himself; that no reason exists or has been assigned for the dismissal and non-appointment of said teachers, and this plaintiff avers that the sole and only reason actuating the said defendant Frederick in refusing to reappoint said teachers is that said applicants are affiliated with a labor organization known as the Grade Teachers' Association, or intended to become affiliated or to continue their affiliations with said organization, and to become affiliated with the Cleveland Federation of Labor, a labor organization, and because they, and each of them, in varying degrees have participated in efforts to form and maintain a union of the teachers of the schools of said school districts."

1916.]

Cuyahoga County.

Thereupon, on September 9, 1914, Judge W. B. Neff made the following order :

“It is therefore ordered that said defendant, J. M. H. Frederick, appear in this court on the 14th day of September, 1914, in Court Room No. 10 thereof, at the hour of 10 o'clock A. M., to answer said charge, and show cause, if any he has, why he should not be punished as for contempt because of said violation of said decree.”

The foregoing citation was duly served on Mr. Frederick, with copies of the charge, on September 10, 1914.

On the same day, September 10, 1914, Mr. Frederick duly filed in the office of the clerk of the court of common pleas an affidavit alleging that Judge Neff was biased and prejudiced against him, and thereby was disqualified to sit in the hearing of the charge of contempt.

The question of the existence of the alleged bias and prejudice on the part of Judge Neff was later passed on by Chief Justice Nichols of the Supreme Court, who found that no bias or prejudice sufficient to disqualify existed.

Without entering his appearance, motions to quash the citation and to dismiss the defendant, based on several grounds, including want of jurisdiction to hear the original action and want of power to make the original order claimed to have been violated, were duly made by Frederick and were overruled with exceptions saved.

When counsel for Frederick were directed by Judge Neff to proceed with the trial before him, on September 30, 1914, and before the commencement of the trial, the city solicitor, Mr. J. N. Stockwell, one of the counsel for the defendant, Frederick, made the following statement to Judge Neff:

“Before we proceed to the hearing in this case, I would like to say a word with reference to the situation here. This case has been a source of embarrassment to a good many of us, and perhaps to the court, certainly to me, and I feel that what I have to say is said under that embarrassment. The court well knows what the procedure was when the motion to cite Mr. Frederick for contempt was made; Mr. Frederick filing an affidavit of bias and prejudice. That motion was heard by Chief Justice Nichols, and in the course of that proceeding certain

testimony was introduced which was passed on by the court, and this court, then, after Judge Nichols had said that he would dismiss it because no evidence had been introduced of bias and prejudice, unless Your Honor felt that he ought to remand it; and Your Honor then, after consultation, said that you felt no bias and prejudice in the case. In behalf of Mr. Frederick, who is here, and is here under circumstances which may deprive him of his property and liberty, I feel it my duty to Mr. Frederick, and my duty as an officer of this court, to Your Honor, to say what I have to say, and that is that Mr. Frederick now feels here in this court that he will not be able to secure a fair trial under all the circumstances. Of course this is a criminal proceeding, a *quasi*-criminal proceeding, and a proceeding in which Mr. Frederick may, through Your Honor's action, be deprived of his liberty. It seems to me that it is due to Mr. Frederick, and to the interests of justice generally, that if a man is cited here, with the penalties which may attach to any conduct which has been his, that every possible opportunity ought to be given to Mr. Frederick to see that he has a fair trial, not only to see that he has a fair trial, but to satisfy him that he is to have a fair trial. That is his feeling. We, therefore, suggest that under all these circumstances Your Honor ought not to hear this motion, and I therefore make application, as an officer of this court, to send it to some other judge. I feel that if I were sitting on the bench, and a person to be tried by me as court and jury, to pass upon the law and the facts, that if such a feeling existed on the part of the defendant, counsel should call that fact to my attention. With that in mind, and with the statement that this is his feeling here, we ask Your Honor to send this case back to the assignment room, because this is a citation for contempt of the order of court, not a citation for contempt of this particular branch of the court—that Mr. Frederick may have an opportunity to be tried by a branch of this court where he feels that he will have every possible opportunity. He does not now feel that, before this branch of the court. It is a reasonable request. He has said certain things in the presence of this court. He feels that there is a bias and prejudice; and with that in mind, I make this application. I know of no case in the whole history of the court, at least in the relations which I have had with this court, where the suggestion has been made, if the litigant does not feel that he wants to try that case before that particular judge to whose room it happens to be sent—I know of no case where even a suggestion of this kind has not prevailed. With that in mind, we make this application.”

1916.]

Cuyahoga County.

The court forthwith overruled the application so made by Mr. Stockwell.

Thereupon the defendant, Frederick, filed his answer, denying all the allegations charging him with having violated the order of injunction, and averring that at all times since the issuing of that order he had acted in full compliance therewith in every respect, and had at no time taken any step towards carrying into effect the resolution of the board of education, and that at no time had he any intention to in any way violate the order of the court. Thereupon the trial before Judge Neff upon the charge of contempt proceeded. Many witnesses were examined on both sides. The following journal entry, made on October 30, 1914, shows the decision of the court, to-wit:

“Now comes the defendant, and the complainants, and this cause comes on to be heard on the evidence touching the defendant's alleged disobedience of the order of the court made heretofore herein; and upon due consideration the court finds that said defendant is guilty as charged, and is thereby guilty of contempt. It is therefore adjudged that said defendant pay a fine of \$500, and costs of this proceeding, and execution is awarded therefor; and it is further ordered that said defendant be committed to the jail of this county for a period of ten days. To which judgment the said defendant excepts. The motion for a new trial of this case is overruled, to which ruling the defendant excepts.”

The record contains over thirteen hundred typewritten pages of the oral testimony taken, and in addition thereto a very large number of exhibits. This is a proceeding in error to reverse the judgment of the court of common pleas, and final judgment by this court, discharging the defendant, is asked here.

Many errors are assigned by counsel for Frederick, which they insist necessitate not only a reversal of this judgment of conviction and sentence, but also final judgment in his favor here. We think it unnecessary to state all the alleged grounds of error with the detail in which they are presented by counsel. The principal grounds, summarized, are:

That the trial judge, Honorable W. B. Neff, was wholly disqualified, by reason of bias and prejudice, to hear the case; that

the court had no jurisdiction to hear the original case in which the order of injunction was granted; that the plaintiff in that action, Owens, the tax-payer, had no right to commence or maintain the action; even conceding the right of Owens, the tax-payer, to thus bring this subject-matter to the attention of the court and the power of the court to consider his petition thus presented, nevertheless the court was wholly without power to issue the order of injunction that it did issue, and that for this reason alone, as well as on other grounds, the order was a mere nullity, and, being so, could not form a sufficient basis to sustain a charge of contempt arising by reason of an alleged violation of such void order; that incompetent evidence, prejudicial to the accused, was admitted over objection and exception; and that the judgment of conviction and sentence is contrary to law and is not sustained by sufficient evidence.

The defendant in error, Owens, claims that the question of jurisdiction and the question of Owens' capacity to bring and maintain the action were necessarily involved in and were passed upon in the original action, and that the judgment of the trial court entered therein can not now be attacked collaterally in this contempt proceeding.

In view of the conclusion we have reached upon the other grounds of error assigned, we deem it unnecessary to spend any time discussing this question of jurisdiction and capacity to sue. We go directly to the controlling legal question in this case, to-wit: Had the court the power to make the order that it did make? Manifestly, if the court was without power to make the order, then the order was utterly void, and, being void it affords no ground upon which to base a prosecution for contempt arising by reason of an alleged violation of the order. In any case involving the liberty of an individual, the fact that the judgment, by virtue of which he is denied his liberty, is void will, when shown, constitute a good defense in his behalf, even though the judgment be one which can not be reversed by proceedings in error. It is quite immaterial whether the judgment be void for want of jurisdiction to hear the case, or because of want of power to enter the judgment. The fact that it is void, for any reason, and not merely voidable, is sufficient.

1916.]

Cuyahoga County.

In the case of *Siebold, Ex parte*, 100 U. S. (25 L. Ed., 717), this language appears in the opinion of Mr. Justice Bradley on pages 376 and 377:

“The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and can not be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it; but personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court’s authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.”

Many other decisions of the Supreme Court of the United States sustain the same proposition.

By the law of Ohio it was the duty of Frederick, the superintendent of schools, to appoint the teachers subject to approval by the board of education. The law prescribes the qualifications of teachers and provides that teachers already in the schools shall be given preference in the matter of appointment as against persons who have not been appointed to teach. Aside from these conditions imposed, the statute makes no attempt to control or regulate the discretion of the superintendent and of the board of education in the selection of teachers the whole subject being committed to their sound discretion.

We have nothing to do in this case with the question of the dismissal of teachers during the term of their employment, as none were dismissed. Neither the superintendent nor any of his assistants nor any of the teachers have any vested right in the position that they hold. The right to longer occupy these positions terminates at the end of the period for which the ap-

pointment has been made, and thereafter the right to continue therein depends upon the judgment of the superintendent and the board in so far as assistants and teachers are concerned, and of the board alone in so far as the superintendent is concerned. It was necessary that this power of selection, appointment and reappointment, should be vested somewhere, and the Legislature saw fit to vest it in the superintendent and in the board of education. The statutes will be searched in vain to find any provision to the effect that the superintendent and the board may only make selections and appointments when they are able to give reasons therefor that are satisfactory to the courts; and the record in this case will be searched in vain for evidence tending to show that any teacher has been appointed who was not qualified to fill the position to which she was appointed. It might well be contended that the superintendent and the board of education were abusing the discretion reposed in them by the Legislature in the selection of teachers if it were shown to be true that they had intentionally and wilfully selected incompetent teachers when competent teachers were available. No such question is presented here. The question here is, there being no showing that any teacher appointed is incompetent to perform the duties of the position, can the superintendent and the board of education be held to have abused their discretion in making selections, because they selected the ones they did instead of others who might have been chosen? It being true that neither the superintendent nor the board is required by law to state the reasons to any one for the selections made, can the court enumerate certain reasons as insufficient and then command the superintendent and the board of education not to omit to appoint for those stated reasons, and then punish them for contempt if they do so?

The Supreme Court of the United States, in the case of *Coppage v. Kansas*, 236 U. S., 1, announced again, on January 25, 1915, the doctrine that any law which abridges the freedom of contract is in violation of the Constitution of the United States. Since that decision, the Supreme Court of Ohio, in the case of *Jackson v. Berger*, 92 O. S., —, decided May 4, 1915, has held that Section 12943, General Code, which reads—

“Whoever being a member of a firm, or agent, officer or em-

1916.]

Cuyahoga County.

ployee, of a company, corporation or person, prevents employees from forming, joining or belonging to a lawful labor organization or coerces or attempts to coerce employees by discharging or threatening to discharge them from their employ, or the employ of a firm, company or corporation, because of their connection with such labor organization, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both,"

—is unconstitutional and void. In the case mentioned, decided by the Supreme Court of the United States, that court was considering the validity of a Kansas statute substantially the same as the section of the General Code above quoted. A large number of decisions were reviewed by the United States Supreme Court in the case cited, and the law pertaining to legislation of this character is there very clearly and definitely stated, and, as I have said, that decision has been followed by the Supreme Court of Ohio in the case mentioned.

We heartily concur in these decisions, and we will not attempt any restatement here of the principles so clearly and comprehensively announced by the Supreme Court of the United States and followed by our own Supreme Court. These two decisions state the law as applied to the rights of an employer to be precisely the same as it has long been understood to be with respect to employees, that is to say, that neither may compel the other to continue the relation of employer and employee beyond the term of service agreed upon, nor can either compel the other to enter into any new contract for service except by mutual consent of the parties. The law thus stated as applicable to individuals, partnerships, corporations and other associations of individuals handling their own money, should surely apply with equal force to public officials who are not spending their own money, but who are trustees of a public fund raised by taxation, and whose duty it is to make these expenditures according to their best judgment for the common benefit of all. Individuals may be very liberal, if they so elect, with their own money. Public servants may not have the funds in hand with which to do as they would like in the matter of increasing the salaries of persons employed by them. They act, as is well known, under many limitations, including often an insufficient tax levy.

It is difficult to conceive of anything that would be more certainly productive in practical application than the proposition that the courts may state to public officers the various grounds upon which they shall not determine against appointing an applicant for a position under the control of such officers. This doctrine extended to its logical result necessarily takes from the public officer very much of the authority given him by law to make the selection in question, and to that extent, and without the slightest warrant of law, passes this power over to the courts. We are very clearly of the opinion that nothing exists in the statutes giving the courts any such power. We think it would be quite as justifiable for the courts to undertake to regulate all political appointments in the state by prescribing that different political affiliations should not furnish sufficient ground for denying appointments, and then proceed to punish the public officer who violated the order by denying appointment on political grounds.

The members of the board of education are elected by the people. If the people make mistakes in their selection of men to fill these important positions, the ballot box, and not the courts, is the place to correct these errors.

We hold that the trial judge in this case was wholly without power to issue the order of injunction which he did issue against the board of education and the superintendent. Having reached this conclusion, it follows of necessity that the judgment must not only be reversed, but final judgment entered here discharging the defendant, and we might stop here in our consideration of this case. However, certain other matters of importance have been argued by counsel, and we will consider some of them.

We have examined, with great care, the evidence submitted in this case. It would serve no useful purpose to attempt a discussion, in detail, of the thirteen pages of testimony and the very large number of exhibits, nor would it be practicable within the reasonable limits of an opinion. Therefore, I will state only the conclusions that we have reached with respect to the evidence. It is this: That the evidence falls very far short of being sufficient to justify the judgment of conviction and sentence in this case. We hold the judgment is contrary to law and contrary to the evidence.

1916.]

Cuyahoga County.

I now go to a question presented in this case that is by no means free from doubt so far as the provisions of the statutes are concerned, and concerning which counsel for plaintiff in error remarked, in presenting it, that they were not very particular which way it was decided, but only that it be decided, to the end that they might not be met with the claim in the Supreme Court that it had not been presented to this court and consequently could not be reviewed there. I refer to the question of claimed bias and prejudice on the part of the trial judge. The affidavit of the defendant, Frederick, charging the existence of bias and prejudice, was filed in due time and was definite and positive in its statements. This affidavit was called to the attention of the Chief Justice of the Supreme Court, who heard the evidence presented by the affidavit and reached a conclusion adverse to Mr. Frederick, and consequently the trial proceeded before Judge Neff. A majority of this court are of the opinion that the filing of this affidavit disqualified the trial judge, under 1687, General Code, as amended 103 O. L., 417, notwithstanding the other provisions in the code with respect to the Chief Justice of the Supreme Court hearing and deciding the question of the existence of prejudice when charged against a judge of the court of appeals. One member of this court is of opinion that the provisions of Section 1687, General Code, amended as stated, only apply when there is in fact an interest, bias or prejudice, and that the section requires a hearing before the Chief Justice of the Supreme Court to determine the fact, in accord with the provisions of Article IV, Section 3 of the Constitution.

It will be noted that Section 1527, General Code, found in the same amendatory act, 103 O. L., 413, makes provision, with respect to the disposition of similar affidavits filed against judges of the court of appeals, markedly different from the provisions of Section 1687, General Code.

It has long been the contention of a very large majority of the practicing lawyers in the state that when an affidavit is filed charging the trial judge with bias and prejudice, that affidavit thus filed should operate to disqualify that judge. We think a great majority of the practicing lawyers have felt the embarrassment and the impracticability of trying to prove that bias

and prejudice exist in the mind of a trial judge. The conviction in the mind of the lawyer or the litigant that it does so exist arises out of a multitude of minute circumstances not easy to bring to the attention of any tribunal trying the question. It is very easy to prove relationship or interest, or to disprove these charges is averred in an affidavit. Not so with the question of bias and prejudice. This court would have preferred that this question might first have been settled by the Supreme Court, and we appreciate keenly the delicacy of any decision upon it by this court in this action. However, we are asked to rule upon the question, and we think we should rule upon it, and, pending further light from the Supreme Court directly on the subject, we hold that, under Section 1687, on the filing of this affidavit the trial judge was without power to hear the case. We have not before us the evidence that was submitted to the Chief Justice on this question, and the Chief Justice did not then have for consideration the evidence in the contempt case or the opinion of the trial judge finding the defendant guilty and imposing sentence. After a thorough review of this case we are firmly of the opinion that if the Chief Justice had been able to look into the mind of the trial judge and see there what is disclosed to us by the evidence in this case and the opinion of Judge Neff, the Chief Justice would very promptly have rendered a decision the very opposite of what he did render on the question of the existence of bias and prejudice. We heartily commend to the Chief Justice, if this case shall reach the Supreme Court, an examination of the evidence and the opinion of the trial judge, on this question of prejudice, and in this connection we call special attention to the statement of the city solicitor, Mr. Stockwell, made to Judge Neff at the commencement of the trial. Every member of this court served for a number of years on the court of common pleas. None of us recall any case in which a trial judge insisted upon hearing a case under circumstances like these attending the trial of this case. It is self-evident, and not contended by counsel to the contrary, that there were many other common pleas judges in the city of Cleveland any one of whom would have been entirely satisfactory to both parties. The defendant was not asking that the case should be heard by some particular judge; he only

1916.]

Cuyahoga County.

asked that he be not judged by that particular judge. It is almost as important, and particularly so in a case where individual liberty is involved, that a litigant shall believe that he will have a fair trial, as it is that he have a fair trial. It is neither becoming nor in furtherance of the ends of justice that a trial judge insist that he and nobody else shall try a given case, notwithstanding the fact that many other equally competent judges are available and notwithstanding the fact that he is thoroughly convinced, as he must have been in this case, that both the defendant and his counsel honestly believed the trial judge to be biased and prejudiced. It is not uncommon for reviewing courts to reverse judgments, even in civil actions, on account of the misconduct of juries. It is somewhat rare to find the claim honestly made by reputable counsel that a judgment should be reversed on account of the intentional misconduct of a court.

We are unanimously of the opinion that the evidence of an existing bias and prejudice against the defendant, Frederick, upon the part of the trial judge in this case, is so manifest from the evidence and the opinion that the judgment ought to be set aside, as contrary to law, on that ground alone, if no other existed.

The freedom of contract guaranteed by the Constitution to all men, and the free exercise of the discretion reposed in the board of education and the superintendent of the public schools, by the statutes of Ohio, are not to be abridged or destroyed by a judicial injunction.

We have not here for consideration and determination the question of whether it was wise or unwise for the teacher's club of Cleveland to affiliate with union labor organizations, and we have no opinion to express upon that subject. That they had a perfect right to affiliate with these organizations and the organizations with them, if they saw fit, everybody must concede. That right is guaranteed to both by the Constitution. Neither are we concerned with the question whether the resolution passed by the board of education was wise or unwise, and we have no opinion to express concerning that. If the board honestly believed that the contemplated affiliation would for any reason be detrimental to the schools, it had a legal right to dis-

courage the completing of this affiliation by the teachers. The resolution of the board coerced nobody, not even the board of education itself. It could have been rescinded at any time by the board when it saw fit to do so.

Whether the best and most modern methods of teaching are employed in the schools of Cleveland; whether, as claimed by some teachers, the schools are over-supervised by too many assistant superintendents and special teachers; whether the superintendent is a suitable man for the position which he holds; whether the grade teachers are in fact underpaid, as they claim, for the work they perform, and whether the board of education could pay higher salaries to teachers out of the funds at their disposal for this purpose, are all important questions for the consideration of the board of education of Cleveland, but they are not questions to be decided by this court, and we express no opinion upon any of these matters.

The question as to whether a refusal alone to appoint an applicant to a position, or the discharge alone of one in a position, could never be held to be coercion and therefore unlawful, where the term of service was at will or had terminated by lapse of time, was directly decided in the case of *State v. Bateman* (10 Dec., 68; 7 N. P., 487) in a very able opinion rendered by Judge Isaac P. Pugsley, then sitting as a common pleas judge of Lucas county. Able counsel appeared in that case on both side, and after the fullest investigation of authorities, Judge Pugsley wrote an opinion in the case so thoroughly satisfactory to counsel that the case was prosecuted no further. It was there decided that the exercise of a legal right, to-wit, the right to terminate an employment when the employment was at will, or at the close of the term of employment when a fixed term was agreed upon, would not support the claim that the exercise of this legal right amounted to an unlawful coercion of the employee whose term of service was thus terminated. The Supreme Court of the United States in the case mentioned cite this decision of Judge Pugsley with approval.

For the reasons stated, the judgment of the court of common pleas will be reversed, and final judgment will be entered here discharging the defendant, Frederick.

RICHARDS and CHITTENDEN, JJ., concur.

1916.]

Cuyahoga County.

**REGULATIONS AS TO WHAT SHALL CONSTITUTE A DAY'S
LABOR ON PUBLIC WORKS.**

Court of Appeals for Cuyahoga County.

OTTO STANGE V. CITY OF CLEVELAND.

Decided, November 15, 1915.

*Municipal Corporations—Validity of an Ordinance by a Charter City—
Limiting a Day's Labor on Public Work—Does Not Impair Con-
tracts, or Conflict with the State Statute on the Same Subject.*

A contract entered into by the charter city of Cleveland is subject to the provisions of an ordinance, subsequently adopted, limiting a day's labor on all public work to eight hours; and neither the defense of impairment of the obligation of contracts, or that the ordinance is in conflict with the state statute on the same subject, is available to a contractor prosecuted for violation of said ordinance.

Squire, Sanders & Dempsey, for plaintiff in error.

John N. Stockwell, City Solicitor, and *Arthur F. Young*, Assistant City Solicitor, contra.

MEALS, J.

The plaintiff in error was convicted in the municipal court of violating an ordinance of the city of Cleveland providing for an eight hour day on public work. The judgment of the municipal court was affirmed by the court of common pleas. Error is prosecuted to the latter judgment.

The affidavit filed in the municipal court against the plaintiff in error charges the latter as follows: That on December 1, 1914, Otto Stange then and there being the superintendent and person in charge and control of a certain plant known and designated as "Casey & Company," at which said plant work of a public nature was then being conducted, to-wit, work on the installation of a water filtration plant for the city of Cleveland, a municipal corporation, unlawfully did then and there permit the workmen in his employ and under his control at said place as aforesaid to labor more than eight hours per day; that said labor so per-

formed as aforesaid not being then necessary as an extraordinary emergency and said laborers so mentioned as aforesaid not then and there being policemen or firemen.

To this affidavit a demurrer was interposed on the ground that it did not state facts sufficient to constitute an offense against the laws of the state of Ohio, which demurrer was overruled.

The principal question presented to us relates to the action of the court in overruling the defendant's demurrer. Other questions are made by the record, but they are of secondary importance.

It is contended by the plaintiff in error that the ordinance for the violation of which he was convicted, is void.

Section 37, Article II of the Constitution of Ohio, as amended in 1912, provides:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

It will be observed that no penalty is provided for the violation of this section. Therefore, to enforce its mandate, an act was passed by the General Assembly on April 13, 1913, entitled, "An act to provide for an eight-hour day on public work in the state, or any political subdivision thereof, or by contractors or subcontractors on behalf of the state or any political subdivision thereof, and penalties for violation of same." This act provides as follows:

"Section 1. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.

1916.]

Cuyahoga County.

“Section 2. Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both:

“Section 3. This act shall be in force and applicable to all contracts let on and after July 1, 1915.”

Section 3, Article XVIII of the Constitution, as amended in 1912, provides:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.”

Section 7, Article XVIII of the Constitution reads as follows:

“Any municipality may frame, adopt or amend a charter for its government, and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government.”

The court will take judicial notice that on July 1, 1913, in pursuance of the authority given by the latter section, the city of Cleveland, by a vote of its people, adopted a charter for its government. Section 196 of this charter provides as follows:

“Hours of Labor. Except in case of extraordinary emergency, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work for workmen engaged in any public work carried on or aided by the municipality, whether done by contract or otherwise. The council shall by ordinance provide for enforcement of the provisions of this section.”

As in the case of the constitutional provision on the same subject, no penalty is provided in the charter for the violation of this section. Therefore, to enforce compliance with Section 196 of the charter, the city of Cleveland, on October 13, 1914, passed the following ordinance:

“Section 1. Be it ordained by the council of the city of Cleveland, state of Ohio: That except in cases of extraordinary emergency not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work,

for workmen engaged on any public work carried on or aided by the city of Cleveland, whether done by contract or otherwise, and it shall be unlawful for any person, corporation, or association who shall employ or direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week except in cases of extraordinary emergency.

“Section 2. Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction, be fined in any sum not to exceed \$500, or be imprisoned not more than six months, or both.

“Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.”

The plaintiff in error was convicted of violating this ordinance.

Counsel for the plaintiff in error contend that the ordinance is in conflict with the general law and therefore void.

Section 3, Article XVIII of the Constitution, as amended in 1912, is a grant of powers from the people of the state to the municipalities of the state. *Fitzgerald v. Cleveland*, 88 Ohio St., 338; *State v. Lynch*, 88 Ohio St., 71; *State v. Edwards*, 90 Ohio St., 305.

Until the adoption of this amendment the municipalities of the state, “in their public capacity, possessed such powers and such only as (were) expressly granted by statute and such as (were) implied as essential to carry into effect those which (were) expressly granted.” *Ravenna v. Pennsylvania Co.*, 45 Ohio St., 118.

By the adoption of this amendment municipalities were empowered “to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.” That the ordinance under consideration is an exercise of local police power seems plain. Is it in conflict with the act of the General Assembly of April 28, 1913, entitled “An act to provide an eight-hour day on public work?” While the operation of this act was suspended until July 1, 1915, we shall assume for the purposes of this case that it embodied the law and the policy of the state on the subject to which it related from and after its passage.

1916.]

Cuyahoga County.

By its terms the act of the General Assembly was applicable to contracts only which were "let on and after July 1, 1915."

The provisions of the ordinance of the city were substantially similar to those of the state enactment, except that they became applicable to "all workmen engaged on any public work" from and after November 22, 1914. Thus the state denounced and penalized the act of employing workmen on public work for a longer period than eight hours in any one day or forty-eight hours in any one week, after July 1, 1915, while the city provided a penalty for the commission of a similar act prior to July 1, 1915.

But it is claimed that inasmuch as the statute was in effect from and after April 28, 1913, and that the policy of the state was declared therein, the ordinance penalizing such act committed prior to July 1, 1915, was in conflict with the general law and void.

The fallacy of this argument seems apparent. The case is not similar, as argued by counsel, to one wherein the Congress of the United States, in the exercise of its exclusive power to legislate upon a subject, "manifests its purpose to call that power into effect and at once remove that subject from the sphere of state action." Here the power of the state is not exclusive. It is concurrent; the municipality being granted like power by the Constitution "to adopt and enforce within its limits local police, sanitary and other similar regulations," subject only to the limitation that such regulations shall not be in conflict with state law.

Municipal police regulations, therefore, are valid unless inconsistent with state law; for it is only when they come in conflict with each other that the ordinance must yield to the paramount law. "Indeed," said Judge Cooley in his work on Constitutional Limitations, page 279, "an act may be a penal offense under the laws of the state and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of one would not preclude the enforcement of the other."

An ordinance or municipal by-law and a state law are not necessarily in conflict merely because they relate to the same

subject. If they are consistent both may stand and the penalties imposed by both may be enforced. This seems to be the uniform holding.

In *Rogers v. Jones*, 1 Wend. (N. Y.), 237, 261, the court said:

“But it is said that the by-law of a town or corporation is void if the Legislature has regulated the subject by law. If the Legislature has passed a law regulating as to certain things in a city, I apprehend the corporation is not thereby restricted from making further regulations.”

Perhaps it is not necessary to multiply cases on this subject, but a reference to two or three will probably not be amiss.

In the case of *Hong Shen, Ex parte*, 98 Cal., 681, the statute of the state of California provided that no opium should be sold until the seller had labelled the opium “poison” and had ascertained that the person purchasing knew its poisonous character and that it was to be used for a legitimate purpose. The city ordinance absolutely prohibited the sale except upon the prescription of a physician, yet the court held there was no conflict in the two regulations. In the opinion in the case the court said:

“While the regulation is different from that of the state there is no conflict, and therefore it is not in violation of the constitutional provision quoted above. There are the very best of reasons why cities should be authorized to impose penalties in addition to those inflicted by the laws of the state. Particular acts may be far more injurious, while the temptation to commit them may be much greater in a crowded city than in the state generally. They consequently require more severe measures for prevention. State laws are, of course, for the general good and can not always answer the peculiar wants of particular localities.”

In *Re Hoffman*, 155 Cal., 114, the statute of the state provided a certain penalty for the adulteration of milk, and that all milk which did not conform to a certain standard should be deemed adulterated. The city of Los Angeles passed an ordinance fixing the standard much higher than that fixed by statute. The statute fixed the standard at 3 per cent. of butter fat, while the ordinance fixed it at three and five-tenths per cent. It was

1916.]

Cuyahoga County.

insisted that the state having thus provided a standard for pure milk, the attempt of the city ordinance to vary this standard created a conflict in the law, with the necessary result that the ordinance must fall. In that case the court held in the syllabus that:

“The mere fact that the state, in the exercise of the police power, has established certain regulations by statute, does not prohibit a municipality from exacting additional requirements so long as there be no conflict between the two, and so long as the requirements of the municipal ordinances are not in themselves pernicious as being unreasonable and discriminatory both will stand, nor is it any objection to the validity of the ordinance than its regulatory provisions and the penalty for its violation differ from those of the state law.”

In the course of the opinion the court say:

“If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not, by ordinance, in the clear exercise of the police power, for the benefit of its citizens still further restrict the height of chimneys? Such, in principle, is the present case. The Legislature has in effect declared that it shall be unlawful to sell milk containing less than eleven and five-tenths per cent. solids, three per cent. of which solids shall be milk fat. An ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state declaration merely is that milk shall not be sold containing less than eleven and five-tenths per cent. of solids, three per cent. of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per cent. of milk fat than that exacted by the state law, there would be a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful, but what the city has in fact done has been to impose not fewer, but additional qualifications upon the milk which may be vended to its consumers. The state, in its law, deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of

densely populated municipalities so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the regulation here questioned."

A similar question arose in *Bellingham v. Cissna*, 44 Wash. 397. There the charter of the city granted to the city of Bellingham full power to regulate and control the use of its streets. A state law was passed making it a misdemeanor to drive an automobile in the streets of any city faster than twelve miles an hour. Later the city of Bellingham passed an ordinance fixing the maximum speed at which a machine could be driven, in the same parts of the city, at six miles per hour. It was insisted that the ordinance must fall because in conflict with the state law, but the court decided upon the soundest principles that there was no conflict and that it was competent for the authorities of Bellingham to prescribe a rate of speed less than that which the state law permitted.

The plaintiff in error was a member of the firm of Casey & Company, a partnership, which entered into a contract with the city on April 30, 1914, for the construction of a part of the filtration plant at the Division Street Pumping Station. This was prior to the adoption of the ordinance but subsequent to the adoption of the city charter. It is claimed that the passage of the ordinance impaired the obligation of his contract and that it is inapplicable thereto.

Without regard to the provision of the contract "that the contractor agrees that he will comply with the provisions of the labor laws of the city of Cleveland and the state of Ohio, particularly as outlined in Section 196 of the city charter," we think it is a sufficient answer to this claim to state that the police power granted by the Constitution to the municipalities of the state is a power which may not be alienated or surrendered by contract or otherwise. *Butcher's Union Slaughter House Co. v. Live-stock Landing Co.*, 111 U. S., 746.

After a careful review of the record we find no error therein, and the judgment is affirmed.

GRANT, J., and CARPENTER, J., concur.

1916.]

Hamilton County.

INJUNCTION AGAINST ENCROACHMENT ON STREET.

Court of Appeals for Hamilton County.

**PETER DREIDAME, A TAX-PAYER, v. THE CITY OF CINCINNATI,
FREDERICK S. SPIEGEL, CHRISTIAN R. HOLMES, HARRY L.
LAWS AND LOUIS S. LEVI, CONSTITUTING THE BOARD
OF HOSPITAL COMMISSIONERS OF SAID CITY.***

Decided, February 14, 1916.

*Vacation of Part of Street—For Use of Municipal Hospital—Enjoined
on Petition of Tax-Payer—On the Ground that No Public Neces-
sity for the Vacation Exists.*

The benefit which would result to the lawn and grounds of a municipal hospital by enclosing therein a part of a public street does not afford a sufficient reason for vacation of the street and consequent injury to the public, and such use of the street will be enjoined upon the petition of a tax-payer.

Wm. Thorndyke, for plaintiff.

Walter M. Schoenle, City Solicitor, and *Saul Zielonka*, Assistant City Solicitor, contra.

JONES (E. H.), P. J.

This case comes into this court on appeal from the court of common pleas.

The plaintiff, Peter Dreidame, first asked the city solicitor of Cincinnati to bring the action, and upon the refusal of that official brought the action in his own name as a tax-payer. He seeks to enjoin the maintaining of an iron fence on the north curb line of Goodman street in the city of Cincinnati, between Burnet and Eden avenues.

At the request of the trustees of the new city hospital the portion of Goodman street, between the north line of the street and the north curb line thereof and extending from Burnet avenue to Eden avenue, was vacated by the ordinance of the

*Motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court, June 6, 1916.

city council. This was done at the instance and request of the trustees of said hospital, so as to permit them to enclose the strip so vacated and make it a part of the grounds or lawn of the hospital.

The case was submitted to us upon an agreed statement of facts. The ordinance vacating the portion of the street above described was repealed by the city council after the iron fence was built and the strip vacated was enclosed. Later this action was brought for injunction.

There was no showing made that there is any public necessity for the vacation of said portion of the street or for the taking of this ground by the hospital authorities. By the erection of the fence the street at this point has been considerably narrowed and obstructed.

We are inclined to the opinion that under the circumstances as shown to the court an injury has thus been caused the general public here represented by plaintiff, for which there is no corresponding public necessity or demand for the ground taken which had been dedicated to the general public for street purposes. A permanent injunction will therefore be allowed against the maintenance of the iron fence and against the encroachment upon and the obstruction of the street caused thereby.

JONES (Oliver B.), J., and GORMAN, J., concur.

END OF VOLUME XXV.

INDEX.

ACCORD AND SATISFACTION—

Where plaintiff, injured by collision of two motor vehicles, sues the owner of one, the latter's answer that plaintiff made a contract of settlement with the other owner, who is not charged with negligence, covenanting not to sue him and that the amount was a full compensation, sets up more than a covenant not to sue, but a full satisfaction and is not demurrable. 191.

APPEAL—

Custody of children a "chancery case" on divorce. 229.

A guardian appealing from an order terminating the guardianship need not give an appeal bond, for the trust has not completely ended until the right of review has lapsed, and it must be assumed that he has no personal interest. [Reversing 18 N.P.(N.S.), 286.] 26.

Where a case to subject a fund in the hands of two defendants jointly is appealed by plaintiff and one of such defendants, the appeal carries up the other defendant, since the fund can not be in court unless the persons who hold it are there. 408.

ATTACHMENT—

The municipal court of Cincinnati (103 L., 280, Sec. 7) having the same jurisdiction in ancillary proceedings as justices, and G. C., 10259, giving an appeal to the common pleas from a justice's refusal to dissolve an attachment, it follows that the common pleas has jurisdiction on such appeal from the municipal court. 11.

Voluntary payment of ten per cent. to one creditor for necessities is no bar to garnishment

by another creditor, though the payment was made by reason of a threat to garnishee. 107.

Billing and collecting from a buyer plaintiff for more than twice the amount shipped is a ground for attachment for a debt fraudulently or criminally contracted. 70.

AUTRE FOIS ACQUIT OR CONVICT—

Assault and battery under G. C., 12423, is a distinct offense from assault with intent to rape under G. C., 12421, and a conviction of the former is no bar to a prosecution for the latter. [Affirmed, 94 O. S., —.] 113.

BILL OF EXCEPTIONS—

Interrogatories to jury and their answers—see verdict. 84.

A bill of exceptions is not filed by leaving it with a deputy clerk in charge of a court room with instructions to file it, and the clerk will not be compelled to stamp it filed after time. 497.

A bill of exceptions does not purport to contain all the evidence when it merely states that the following testimony was offered, all of which is hereafter fully set out, for that merely states that it contains what it contains. And a statement in the bill that it contains all the testimony is not a statement that it contains all the evidence. 419.

Striking the bill of exceptions from the files does not authorize a dismissal of the petition in error. 481.

BONDS—

A bond to repay if the obligee is compelled to pay a third person,

together with counsel and court fees, only covers such fees if the third person is successful in the litigation, and not such fees incurred in defeating it. 97.

Sinking funds, purchase of, are assets; how re-sold. 369.

BILLS AND NOTES—

Endorsement "without recourse" is not a mere assignment, and the endorsee may have all the rights of innocent holder in due course, free from equities of the maker. G. C., 8143, does not change this rule. 173.

Where a majority and not a two-thirds vote of the electors authorized a bond issue, the whole issue is not invalid, but such part is valid as satisfies the $2\frac{1}{2}$ per cent. of the total value of city property under G. C., 3952. [Affirmed without report, 94 O. S., —.] 458.

BUILDING CONTRACT—

See SURETY.

Custom of sub-contractor to pay part of expenses. 142.

A provision that the contractors building a grain elevator should indemnify and save harmless the owners from any loss by failure of the elevator to be serviceable for the purpose intended, means more than that the work shall come up to the plans and specifications, but is an express warranty of serviceableness. [Affirmed without report, 90 O. S., 446.] 151.

The architect's certificate is competent evidence on the subject of damages, although it purports to cover matter "brought to our notice" and to be made partly in view of sworn statements of the owner's agent, for these merely show the evidence on which it was based. 292.

Where a contractor for a heating system guaranteed to produce a certain temperature, on finding this impossible under the plans and specifications offers to comply with his guaranty by change of equipment, the owner has the option to insist on the specifications

and lose the heat or to obtain the heat by change of equipment, and by insisting on the former waives the guaranty. 149.

Waiver of a clause against claims for extra work unless done by written order can only be shown by evidence so clear and convincing as to leave no reasonable doubt. [Affirmed without report, 90 O. S., 446.] 151.

Stipulated damages for delay are *prima facie* liquidated damages, to impeach which effect the burden is on the contractor's surety. 292.

A charge not to allow any damages called for by the contract for each day's delay to complete on time if the defendant by acts, words or ordering extras extended the time is erroneous, for it does not regard the duration of the delay so caused. [Affirmed without report, 90 O. S., 446.] 151.

CARRIER—

An act of God to be a defense must be the sole cause of loss. If the carrier's negligence brings the goods in contact with the forces of nature he is liable, as where a defective car necessitated reloading and the delay exposed the car to the Dayton flood. 204.

Where under a uniform contract the shipper was to water his stock, but where upon a delay the carrier agreed to water them and by neglect to do so forty died, *Held*: the carrier's waiver is not an unlawful preference to the shipper under G. C., 508, 564, 567 and 568, which relates only to an unreasonable discrimination granting a concession not enjoyed by others [reversing 17 N.P.(N.S.), 42]. 335.

A charge that a crippled passenger must exercise "greater care" than others is properly refused. The charge should be that in determining whether he exercised ordinary care his crippled condition should be considered. 208.

It is not negligence *per se* for a passenger to take a position on the bumper of a street car where there is no room on the platform and the conductor collects his fare and recognizes him as a passenger. 212.

A charge that the carrier must exercise the care which very careful and skillful employees would exercise is erroneous, for only the highest care which ordinarily careful and skillful employees would exercise is required. 208.

A charge that if plaintiff was at the depot platform intending to take an in-coming train he was a passenger and entitled to the highest care is erroneous. It is for the jury to say whether he was a passenger, and as before boarding the train he has control of his own motions, he is not entitled to that degree of care. 479.

A charge "if you find that defendant was negligent in starting the car before plaintiff had an opportunity to be seated" is error, for it implies that starting before a passenger can be seated is negligence, which is not the law. 208.

Although by a so-called "average agreement" a consignee has waived a demurrage rule allowing a consignee extra time to unload where cars are bunched and delivered in accumulated numbers in excess of daily shipments "as the result of any act or neglect" of the railroad, yet where the delays and consequent bunching were due to the floods of March, 1913, and not to the fault of the railroad and therefore not within the rules or agreement, yet demurrage can not be charged, for a party relieved by an act of God can not be permitted to penalize the other for delay so caused. 379.

Where connecting carriers are not designated in a shipment, the initial carrier is not a general agent of the shipper but acts under a special authority, revocation of which is binding on

connecting carriers. Hence if notice by the shipper to an intermediate carrier not to deliver to the final carrier is disregarded, the latter has no right to hold the goods for payment of demurrage and a division of freight charges in controversy with the preceding carrier. Charges do not inexorably follow from the fact of service, but only if the service is authorized. 276.

A shipper's agreement, in order to obtain release of his goods to pay demurrage and car service which are not legal, is void. 276.

Where the consignee refuses to accept a car load shipment and the consignor on notice refuses to give the carrier instructions, the consignor, with whom alone the carrier has contracted, is liable for demurrage, although the title may be in the consignee. 527.

CHARGE OF COURT—

A charge "you have a right to accept or reject part or all of a witness' testimony and give credit to those you find entitled to it" does not violate the rule laid down in 90 O. S., 419. 201.

Error in refusal to give a charge before argument as requested is not prejudicial error where it is incorporated in the general charge and not sustained by the evidence, and the principle covered by it is so interwoven into the case that the refusal could not have affected the argument. 29.

A charge that burden of proof means the duty of satisfying the jury imposes too great a burden on the plaintiff, but being prejudicial to him alone and not to the defendant, the latter can not complain. 201.

CHATTEL MORTGAGE—

Withholding from record chattel mortgages on all the assets of the mortgagor, who is fairly believed to be solvent, not by agreement or fraudulent intent nor to enable the mortgagor to secure

credit from others, but merely to prevent creditors closing down until the return of a friendly financial backer, is not a fraud on present or prospective creditors. 72.

CIVIL SERVICE—

A temporary appointee by the mayor in 1912, before the commission furnished an eligible list, was an incumbent when the law of 1913 went into effect and entitled to hold his position until he failed to qualify or was discharged for cause. 241.

Where the law forbids promotion unless the applicant attains a certain per cent. on examination, the fact that he falls a fraction of one per cent. below does not entitle the appointing officer to promote him on the ground of believing that in age, judgment and manhood he is better than one of a higher percentage. 361.

Failure in the rules of promotional examinations to prescribe the branches of examination whereby the examination might be on Greek or any other national line, will not be ground for the court's interference with the result where the questions were fair and pertaining entirely to a practical knowledge required by the position sought. 361.

COMPROMISE—

See ACCORD AND SATISFACTION.

CONSTITUTIONAL LAW—

General Code, 9012 to 9014, putting a penalty upon a corporation for compelling employees joining and contributing to a relief association and waiving any right to damages for personal injury, are valid. They are not impairments of the right to contract, and an employee compelled to contribute can recover the penalty. 305.

The indeterminate sentence law not applied to prior offenses. 281.

No vested right in a remedy; jury law applies to pending cases. 415.

Right to face witnesses; hearsay. 257.

CONTEMPTS—

Violation of void injunction not punishable. 581.

CONTRACTS—

Waiver of conditions. 149.

Impossible condition; waiver of. 149.

Waiver of clause against extras must be beyond reasonable doubt. 151.

Where plaintiff's agent was authorized to offer \$2,500 for property and paid \$400 down but the receipt for the \$400 stated that the plaintiff was to pay the June taxes and the pleadings do not show that plaintiff's agent was authorized to assume the June taxes, plaintiff is entitled, on revoking the offer, to a judgment on the pleadings for \$400. 337.

On refusal to carry out a contract to convey property to be paid for in future services, the measure of damages is not the value of the property but what the contract was worth to the vendee at the date of breach, in estimating which the jury must consider the contingencies which may prevent performance of the services and the value of the time saved to the vendee. [Affirmed without report, 71 O. S., 546.] 84.

CORPORATIONS—

Equity has no power to require a board of directors in the absence of fraud or abuse of discretion to declare dividends out of abundant earnings, nor by consequence to declare paid a note which provides to be paid out of dividends but is not so paid because of failure to declare dividends. 561.

Employee buying stock in reliance on officers, holds subject to their bad judgment if *bona fide*. 561.

COUNTER-CLAIM—

In an action for stipulated damages for not conveying property

as agreed, defendant's answer denying that she owned the property will not bar her subsequent suit to enjoin collection of the judgment on the ground that the agreement to convey was procured by fraud. Her failure to set this up by counter-claim merely puts the costs on her. 475.

COUNTY—

The liability of county commissioners for an unsafe highway (G. C., 2408) has not been impliedly repealed by the state aid statutes, the state commissioner's duties being merely advisory; and where the county's contractors in re-paving a road stretch a wire across it without guards or warning whereby a motor cyclist is injured, the county is liable for such negligence. 443.

Actual notice of a defect in a highway is not necessary to a liability if there is constructive notice. [Affirmed without opinion, 88 O. S., 587.] 415.

Although absence of funds with which to repair a road is a defense to an action for injuries, it is defensive matter and the petition need not aver means to repair. [Affirmed without opinion, 88 O. S., 587.] 415.

COURTS—

An affidavit of bias and prejudice on the part of a trial judge disqualifies him under G. C., 1687, as amended in 103 v. 417. 581.

Jurisdiction of circuit court applied to court of appeals. 218.

The probate court being a court of record, its proceedings are presumed within jurisdiction and import verity and are not collaterally impeachable. [Affirmed without report, 88 O. S., 623.] 129.

COVENANTS—

"Owner" means fee simple or absolute in a grantor's covenant that he is the true and lawful "owner." 283.

Parol evidence that the grantee assumed an unexpired lease on the

premises before delivery of the deed and as a condition thereof, is admissible in an action on the covenant against incumbrances, for it is not inconsistent with the covenant but is in effect a discharge of the liability thereon. 529.

CUSTOM—

In a sub-contractor's action against the head contractor for an amount due, evidence of a custom among contractors by which the sub-contractor bears a proportion of the cost of board, conveyances, etc., for agents, engineers and surveyors furnished by the head contractor is admissible, not to vary the contract, but to explain surrounding facts under which it was made. 142.

DAMAGES—

Ten thousand dollars for the loss of a leg of a fourteen-year-old boy is excessive and either a remittitur to \$7,500 or a reversal must be accepted. [Below, 18 N.P. (N.S.), 409.] 49.

Breach of contract to convey payable in future services. 84.

Jury should be told meaning of punitive damages. 321.

Re-sale not evidence of market value. 225.

DEATH BY NEGLIGENCE—

In an action by a mother as administratrix for the death of a child she can not recover for her own benefit if those in whose custody she had placed the child failed to use ordinary care for its safety. 29.

DESCENTS—

Where S died testate without issue, leaving brothers and sisters and a widow who elected not to take under the will and later died intestate without either issue or brothers and sisters, she took her distributive share of her husband's personal estate under G. C., 10571 and 8592 and not under G. C., 8574, paragraph 2; hence G. C.,

8577 does not apply and her heirs take what she leaves, to the exclusion of her husband's brothers and sisters. 185.

DEVISE—

An illiterate will is construed to give its language the testator's most probable intention, dealing lightly with syntax and punctuation. Thus a devise to the wife of all real property for life and all personal property with a request that she give their foster-son \$2,000 when of age; if she should marry again all of the property to be kept in the wife's name and after her death the property, if any, to be divided between the foster-son and a named church, gives the wife the realty for life, the personalty absolutely, a \$2,000 legacy to the foster-son charged on the realty and subject to the life estate, and after the wife's death and payment of the legacy the real estate is to be divided between the foster-son and the church. 492.

Descent where widow elects not to take under will. 185.

A devise in trust to pay the income to a daughter for life and at her death convey the estate to her heirs, means those who would be her heirs at her death. "Heirs" is used in its technical sense; hence the deed of his share by a child who died before her conveys nothing. 347.

A devise to the widow for life and "after her death" to my children, and if any child dies before the widow leaving heirs of his body, such heirs shall take the share that would have been "due" to their parent gives the children a remainder which vests at once on the testator's death subject to be divested by death and a deed by a child who died during the life estate is void as against his children, for they take not as his heirs, but under the grandfather's will. 283.

Child or other relative in G. C., 10581 means legitimate child

and not one who could not be an heir, and hence a legacy to an illegitimate child, though always treated as a daughter, does not pass to her children if she dies before her father notwithstanding his apparent intention. 522.

DISMISSAL—

The court may grant plaintiff leave to dismiss after all the evidence is in and defendant's motion for an instructed verdict has been partly argued but not yet submitted, and defendant is not prejudiced thereby. 33.

DIVORCE AND ALIMONY—

The amendment of G. C., 1637, passed February 6, 1914, depriving the Court of Insolvency of Hamilton County of jurisdiction in divorce and alimony cases, after December 31, 1914, took away its jurisdiction in pending cases. G. C., 26, does not apply, for the amending act manifests a different intention. Hence, a writ of prohibition lies to the judge of the court of insolvency. [Reversed, 94 O. S., —.] 1.

Custody of children is a matter inherently equitable and hence is included in "chancery cases" in Section 6, Article IV of the Constitution, giving jurisdiction to the court of appeals, and hence an order in a divorce case affecting custody is appealable notwithstanding G. C., 12002. 229.

DURESS—

A criminal prosecution for the purpose of extorting payment of a debt is for an illegal purpose though well founded and will be regarded as duress, and any security thereby obtained may be avoided. 351.

A sister may avail herself of the defense of duress where she has given a mortgage to save her brother from criminal prosecution. 351.

One giving a note and mortgage under duress, although to prevent a criminal prosecution of

a brother, is not a free agent and therefore not in *pari delicto*. 351.

Duress is a species of fraud, and if notes and a mortgage are obtained by it and transferred to a *bona fide* buyer, may be set up against the mortgage. 351.

One, who having obtained a note and mortgage by duress transfers them to an innocent holder, becomes the principal debtor, and the maker becomes the surety and entitled to have the principal brought in. 351.

EJECTMENT—

A mortgagor or his heirs can not maintain against holder under void foreclosure. 551.

ELECTIONS—

Failure to publish for full thirty days a notice of an issue of bonds will not invalidate the vote if notice was evidently brought home to the great body of electors. 458.

EMINENT DOMAIN—

A private company may erect and maintain poles and wires in streets for lighting the streets under contract with the city, and an abutting owner can not enjoin, though part of the current is for private purposes, provided such dual use does not essentially impair his property, and such use is not an additional burden. 44.

ERROR—

Where evidence is somewhat conflicting and of a nature that different minds might arrive at different conclusions, a reviewing court will not reverse on the weight of evidence. 537.

Where but two judges of the court of appeals concur in reversing on the weight of evidence, a party is entitled to procure this fact to be stated in the entry. 318.

Under G. C., 11364, and under the general principles of law a reviewing court may modify or correct the judgment below and where the evidence is hopelessly confused but substantial justice

can be done by reducing the amount awarded this w'll be done. 146.

Summons in error on the state in a case by a wife against her husband for non-support of a child can be waived only by the prosecuting attorney (G. C., 13754). A waiver by the wife's attorney gives no jurisdiction. 166.

A child being killed by an automobile, a statement in presence of defendant, "We were running awfully fast," to which defendant made no response, is not competent evidence, but is not prejudicial error where the accident was certainly caused by negligence of the driver. 29.

The withdrawal of a juror and granting a continuance after defendant's motion for an instructed verdict has been partly argued but not submitted, is within the power of the court. G. C., 11453, is not exclusive, and this is not an order affecting a substantial right to which error lies. 33.

EVIDENCE—

Judicial notice of the adoption of a city charter will be judicially noticed by the court of appeals sitting in that city. 599.

Pedigree is provable by the hearsay evidence of those related by blood or marriage to the deceased. 118.

Ordinances of the city will be judicially noticed by the superior court of the city, it being a court of the city, but not by the common pleas because it is not a court of the city. 1.

The flood of March, 1913, has been many times held to have been an act of God, and the courts of the Ohio and Miami Valleys may take judicial notice that such flood was of that degree. 379.

No admission if not called on to answer. 257.

Confession must relate to identical accusation. 430.

Where a lumber firm agreed with an insurance agent for valu-

able consideration to take insurance for three years at a rate not exceeding the average rate paid by other lumber firms and the agent is suing for breach by the company's refusal to insure, it is error to admit the testimony of a rating bureau as to what the rate should be, although its rates on property were used by nearly all the insurance agencies; for an expert opinion as to what is a proper rate is not relevant to prove the average rate paid. 84.

Parol evidence to vary writing; lien assumed; covenant against incumbrances. 529.

Assurances by the representative of a corporation to one subscribing for stock for which he gives his note that the company will not engage in any other business and that the earnings would be applied to the note and he not be called on to pay it, vary the writing and are incompetent. 561.

In a case for injuries from a defective sidewalk, repairs and changes in the walk since the accident being admissible to show control by the village but not as proof of negligence, failure of the court in instructing the jury to restrict the evidence to its proper purpose is reversible error, although no request of the court to do so appears except incidentally in objecting to questions as not restricted to the proper purpose. 273.

Preponderance sufficient to avoid lease for gambling. 193.

Disagreement of witnesses as to whether the head-light of a locomotive was lit is not a case of affirmative and negative testimony but is all affirmative. 326.

Waiver of clause against extras must be beyond reasonable doubt. 151.

EXECUTORS—

A creditor of decedent does not waive his priority over mortgages made after decedent's death by his heirs to pay off other general debts, by taking from the heirs a

still later mortgage securing such claim and extending the time thereon, but stipulating therein that such priority is not waived. 411.

Where an executor resigns after collecting but not disbursing the assets, the commissions (G. C., 10837) for ordinary services must be apportioned between him and his successor in proportion to the services of each. 198.

EXTRADITION—

The Governor on due demand for a fugitive should first determine whether the proper steps have been taken and legal ground exists and that the case is within the statutes, and if he so finds his duty is to issue the warrant. 249.

The presumption is that the Governor, in issuing the warrant, found that the application was in good faith and this presumption obtains unless rebutted. 249.

Technical objections to the charge of the offense are not to be considered. 249.

Neither the Governor nor the court pass on the guilt of the accused but only whether an offense is charged under the laws of the demanding state, and on the identity of the party and whether he is a fugitive and that the extradition is not in order to collect debt. 249.

FIDUCIARY RELATION—

An employee of a corporation for many years, with great confidence in its officers, who, at their request, buys stock in a new corporation formed to continue the old and controlled by them, is in a fiduciary relation with them; but this does not create a liability for losses by change of the business due to honest mistake of judgment. 561.

FORCIBLE ENTRY—

That the landlord has leased the premises to a new tenant who has

not gone into possession will not bar his right. 193.

FORGERY—

The defendant is entitled to have the forged instrument produced at the trial or its absence satisfactorily accounted for before secondary proofs of its contents, and a mere statement by the prosecuting attorney that he did not have and had not seen it since the sitting of the grand jury is not sufficient. 430.

Confessions are not sufficient to sustain a conviction of forgery where they do not satisfactorily appear to relate to the identical document of the case. 430.

FRANCHISE—

Subject to right to eliminate grade crossing. 543.

FRAUDS, STATUTE OF—

Lessee's oral agreement to remain as monthly tenant. 385.

Modification of the terms of an agreed transfer of a lease is within the statute of frauds and oral evidence thereof is not admissible in an action for rental where there has been no performance. 234.

FRAUDULENT CONVEYANCE—

Error in charging that the testimony of relatives as to transactions between them must be taken with allowance is cured by adding that if of such nature as to convince you they are telling the truth it is entitled to as much weight as that of other witnesses. 537.

GAMBLING—

Recovery of possession of property upon which gambling is being carried on by the lessee. 193.

GIFT—

A man having borrowed \$2,000 from one whom he looked upon as a daughter gave her his interest bearing note therefor due in five years and assigned and delivered to her as collateral his

\$7,000 life insurance, with a condition that they should be hers in full if she survived him, otherwise to revert to him on payment of \$2,000. The life companies recognized the assignment. *Held*, the note and delivery of the policies as collateral is of a commercial nature and the gift of the excess insurance is not *in praesenti*, but a promise to be fulfilled at death and is void. 132.

GUARANTY—

Impossible term in a building contract. 149.

Serviceableness of the building. 151.

GUARDIAN AND WARD—

Substituted for ward as plaintiff. 129.

Discharge of a patient from a hospital for the insane does not terminate a guardianship over him. 129.

G. C., 10954, allowing a ward two years after coming of age by civil action to open and review the guardian's settlement for fraud or manifest mistake means by the latter term an error which the account itself discloses, and where there are two wards jointly owning a single fund and the guardian had settled with one and now charges his entire fee to the other, this shows such manifest mistake. 365.

A guardian has a right of appeal from an order of the probate court terminating the guardianship. Appeal bond not necessary. 26.

HABEAS CORPUS—

Whether the court in a contempt proceeding properly heard testimony on the fifth of the month when it had previously been continued until the twelfth, is merely a question of regularity and correctness; hence habeas corpus does not lie, as it can not perform the office of a writ of error. 383.

INJUNCTION—

Expulsion from a home for the aged, of one who, by substantial payment has a contract right to remain there, is enjoined if there is no adequate remedy at law, to determine which free latitude should be allowed of hardship, as inability again to buy a home for life and the breaking of friendships and associations. 465.

Smells from authorized garbage reduction plant. 533.

Although a judgment involving personal liberty (as here for violating an injunction) can not be reversed because not properly taken up in time, yet if it is void either for want of jurisdiction or for want of power to enter the judgment this fact will constitute a good defense. 581.

INSANE ASYLUM—

The proceeds of the bonds in question, so far as issued for new buildings, must be disbursed by a building commission; but proceeds for repair of existing buildings may be disbursed by the asylum directors. 575.

INSURANCE—

Failure to pay an assessment which includes an amount which can not be lawfully added does not forfeit membership. It does not devolve on the member to ascertain and tender the lawful amount. 65.

Including in an assessment to pay losses and expenses an amount to re-pay officers for money advanced without resolution of the company to pay losses as they occurred, which loans are ratified by being so included, does not make the assessment illegal, and failure to pay the same forfeits the protection of the policy. 65.

Where the insured sells the property and assigns the policy to the buyer with the consent of the company, the assignee holds the policy in his own right as by a new contract of insurance and not in the right of the insured and is therefore not affected by a re-

striction (exempting some stacks from a tornado policy) which was not attached to the policy nor known to the assignee. Contra, had the assignment of the policy been for security and not absolute. 339.

A clause limiting the time within which suit may be brought is subject to G. C., 11233, extending time when a suit fails otherwise than on its merits. 509.

INTENT —

Motive of lawful act not material. 369.

INTERPLEADER—

Although G. C., 11265, provides for an affidavit for interpleader before answer filed, and although a court may permit withdrawal of an answer in order to file an affidavit of interpleader, this is discretionary with the court, and its refusal is not reviewable. 337.

INTOXICATING LIQUORS—

Liquor licensing boards perform quasi-judicial functions and are not answerable in damages for errors and mistakes as here for refusing a license to a prior dealer averred to be entitled thereto. 183.

G. C., 6082, imposing a penalty of twenty per cent. upon one who engages in the liquor business without paying an assessment, refers to the assessment imposed by that section alone, and not by preceding sections (unlike its prototype, R. S., 4364-13), and hence if compelled to be paid by one who had not paid an assessment, but had not refused information to the assessor on demand, can recover it back. Tax laws can not be liberally construed. [Affirmed without report, 88 O. S., 578.] 221.

Conviction for keeping open on Sunday will not be reversed for failure of the record to show that the court examined to ascertain whether it was a first offense pursuant to G. C., 1261-69 (103 L., 239), where the affidavit and judg-

ment are based on a first offense. 440.

JURY—

Where different minds would conclude differently. 470.

In a will contest. 485.

G. C., 11418-1 (as amended 102 v. 41), allowing a jury to be drawn from another county where its county commissioners are parties, is constitutional and applies to pending cases, for there is no vested right to a remedy. [Affirmed without opinion, 88 O. S., 587.] 415.

Waiver of a jury is not shown by a record merely stating that "defendant did not demand a trial by jury." 255.

JUVENILE DELINQUENCY—

A conviction for causing the delinquency of a child cannot be sustained where the record fails to show proof that the child was delinquent, nor by evidence of acting in a way to cause delinquency, for this is a different offense. 255.

LABOR—

Hours limited by city charter but not penalized until after contract made. 599.

LANDLORD AND TENANT—

Oral modification of transfer of lease. 234.

Lessor can sue though has released. 193.

An oral agreement by a lessee under a year's lease to continue after the term as a tenant from month to month is within the statute of frauds and he is in for another year unless his continuance is distinctly referable to the new contract. 385.

A lessee under a lease for a year by holding over is in for another year at the landlord's option. 385.

The rule binding for another year a yearly tenant who holds over is not relieved from by nego-

tiations for a new lease or failure to make promised repairs or retention of the key sent by mail. 577.

Where H, owner of a lease, agreed to transfer it to the H Co. and the H Co. agreed to transfer it to M and tendered the transfer, M is justified in refusing the transfer where H has not assigned to the H Co. because it would not confer a complete title. 234.

A lessor's right to recover possession if gaming is conducted on premises obtains as well where the result of a game depends on skill and dexterity as on chance and though the prizes are of equal value. 193.

G. C., 5972, making a lessor criminally responsible if he does not forthwith "on good faith" forfeit the lease, does not make his motive a defense to a forcible detainer nor his prior consent to the gambling a bar. 193.

A preponderance of the evidence is all that is required in a lessor's forcible detainer based on using the premises for gambling. 193.

LIBEL AND SLANDER—

Temperate and truthful criticism of a candidate for office in order to inform voters is not to be discouraged. Publication by a civil league "his business and court record disqualifies him for the Legislature" merely charges incompetency and is not libellous *per se*. 49.

LIEN—

Where a daughter buys a lot in her own name and by agreement with her father, a carpenter, he helps build a house upon it which is the home of both, he has an equity in the property and his living there is notice to any one that he has such equity. 351.

LIMITATIONS—

Where a case was dismissed for non-prosecution in 1904, and two months later the dismissal was set aside as made by mistake, and in 1906 the latter entry was set

aside because made without notice, thus leaving the dismissal standing, the action failed otherwise than on its merits in 1906 and not in 1904. See *Hutton v. Curry*. [Affirmed, 93 O. S., 339.] 22.

A court of last resort, having fixed the date on which the first action had failed otherwise than on its merits, a defense to the second action, seeking to show a different and earlier date for such failure, will be stricken out as *res judicata*. [Affirmed, 93 O. S., 339.] 22.

LONGVIEW ASYLUM—

See INSANE ASYLUM.

MALICIOUS PROSECUTION—

Probable cause where the facts are undisputed is a question of law. It is error to define probable cause in general terms and leave the jury to find whether the facts come within the definition. The court should tell the jury whether the facts which the evidence tends to prove constitute probable cause, leaving them to find the existence of the facts. 321.

Advice of counsel before whom all the facts known to defendant were laid in good faith is conclusive evidence of probable cause and it is error to refuse so to charge. 321.

That the grand jury indicted plaintiff is *prima facie* evidence of probable cause. 321.

Waiver of examination before the justice of the peace is *prima facie* evidence of probable cause for the prosecution. 321.

It is error to charge that defendant's continuance of the prosecution after the charge was nolle, knowing that it was not well founded, is evidence of actual malice warranting punitive damages where there was no evidence that defendant had such knowledge and no explanation of the term punitive damages or of its application. 321.

Relief association; compulsory membership in. 305.

MASTER AND SERVANT—

Assumption of risk where the facts are admitted is a question of law and not to be left to the jury. 423.

Failure to limit charge to ordinary negligence. 423.

A gratuitous invited volunteer can not claim ordinary care in furnishing proper tools or a safe place but must be satisfied with what he finds. But if he is serving a purpose of his own or of his own employer he is entitled to such care from the one inviting him or his servants, for they are not fellow-servants. 423.

MAXIMS—

Equity considers that done which ought to be done. 561.

He who seeks equity must do equity. 561.

MORTGAGES—

Duress avoids in hands of *bona fide* buyer. 351.

Although a deed may be decreed to be a mortgage at the instance of a grantee and his representatives as well as of a grantor, this is only to prevent injustice, and where the grantor is satisfied no such decree will be made at request of the grantee's representative solely to enable him to foreclose or collect and distribute the proceeds. 198.

An endorsement of transfer on a mortgage "per the terms and conditions of a contract" of this date carries notice of a limited right in the assignee (as here as collateral only) and the assignee's satisfaction of the mortgage can not be relied on by later mortgagees but will be set aside and its priority restored. 502.

After condition broken the mortgagor or his heirs have no legal title on which to sustain ejectment against one in possession under a void foreclosure of the mortgage. 551.

MOVING PICTURES—

A moving picture show is a theatrical performance within the meaning of the Sunday law. 556.

MUNICIPAL CORPORATIONS—

The location of poles and wires for lighting streets rests with the city and will not be interfered by the courts in the absence of abuse of discretion. 44.

The city of Cleveland in 1913 adopted a charter in which eight hours was made a day's work on public contracts, but no penalty was enacted. In 1914 defendant contracted to do certain public work. Later the city placed a penalty on exacting over eight hours. *Held*, although the existing eight-hour state law was not to be in force until 1915, the penal ordinance was valid and not in violation of the contract and defendant can be prosecuted under it. 599.

The sinking fund trustees are given unlimited power, in order to be ready to protect the city's credit, to sell the city's bonds in their possession without advertisement or receiving par value. G. C., 4522, that bonds "issued by the trustees shall be sold the same as other municipal bonds does not apply nor does G. C., 3923 and 3924, requiring that no city bonds shall be sold for less than par and after thirty days' advertisement. 369.

The purchase of bonds of a municipality by its sinking fund trustees under G. C., 3922 and 4514, is not a retirement but an investment of the bonds and they are assets in the hands of the trustees the same as other securities purchased. 369.

Enclosure by a city hospital of the sidewalk of a street vacated by the city for the purpose of benefitting the hospital lawn is not justified as a public necessity and will be enjoined in a taxpayer's suit as an injury to the public. 607.

A city may, under its police power, enact restrictions and pen-

alties excepting those imposed by the state law. This is not contradicting the latter. 599.

While the adoption of plans and direction to construct a public building (a fire engine house) are governmental acts, yet the construction of the building is purely ministerial and if so carelessly done that part of a wall falls and injures adjoining property the city is liable. 303.

Payment by the city treasurer on the auditor's warrant for services rendered to the city will be presumed legally paid on the authority of the council. And the city can not recover back the payments, no fraud or unreasonableness being charged, on the mere allegation that no ordinance "appears" authorizing the payments. 419.

Where the lid of a manhole in a sidewalk tilted when stepped upon by plaintiff, previous accidents to others are admissible to show constructive notice to the city and it is error to confine it to its bearing on the dangerous condition of the lid. 506.

MUTUAL BENEFIT SOCIETIES

Injunction against expulsion; no adequate remedy at law. 465.

Payment of a specific sum to a home for the aged as consideration of a promise to provide a home for plaintiff constitutes a contract which courts must take cognizance of as distinguished from membership in a fraternal order. 465.

In a suit to enjoin the expulsion of a member from a home for the aged, membership in which she had paid for, it is error to exclude her proof that a copy of the charges was refused her; that the charges were not substantial, and proof of all other things connected with the order of expulsion. 465.

NEGLIGENCE—

Violation of a city ordinance forbidding vehicles to pass a street

car standing to let passengers on or off, is negligence *per se*. [Affirmed, 94 O. S., —.] 17.

A charge of liability if there was negligence is faulty because it would include the slightest as well as ordinary negligence. 423.

Where a passenger on the bumper of a street car is struck by a car following behind and his petition avers and his evidence tends to prove that the motorman of the car behind knew or by ordinary care could have known such fact, failure of the motorman to use ordinary care to avoid the collision renders his company liable. 212.

Bursting of the boiler of a traction engine on a public road killing a person, is not actionable if he was a mere onlooker idly watching, for no duty owing him was violated. He assumed the risk. 317.

A person driving on a highway is not guilty of contributory negligence in allowing the wheels of one side to be outside the macadamized part of the roadway whereby they fell into a hole. [Affirmed without opinion, 88 O. S., 587.] 415.

It is not error to refuse a charge requiring looking and listening just before driving on the track. The law does not require any specified distance but only such proximity as makes looking and listening effective, which may be forty feet away if there is a clear view for three-quarters of a mile. 326.

One who, approaching a sharp curve in the highway, unnecessarily drives so close to a street car track that his wagon is struck by a car coming round the curve before he can turn out, can not recover. 404.

A special verdict that decedent, killed at a railroad crossing, could have seen a stated distance up the track, does not show contributory negligence nor is it inconsistent with a general verdict, for decedent

is presumed to have looked and may have been misled by the absence of signals on which he had a right to rely.

The defense of contributory negligence of one who knowingly walks over an ice-covered sidewalk, which she could have avoided, is not cut off by the fact that the ice came from a defective down spout neglected contrary to a city ordinance; for if this is considered a willful neglect, the intervening agency of contributory negligence is primarily responsible. 122.

A wagon boy, whose duty it was to stand on the tail-gate and watch the load and help the driver unload on request, is not engaged in a joint enterprise with the driver, so that the latter's negligence is imputed to him when injured by collision with a street car. [Affirming 18 N.P.(N.S.), 409.] 49.

Standing on bumper of street car is not negligence, when. 212.

NON-SUIT—

If the testimony tends to prove plaintiff's case, it is error to direct a verdict; weighing of testimony is not permitted, and so if the testimony is not conflicting but differing minds would reasonably conclude differently therefrom. 470.

Directing a verdict for defendant on plaintiff's opening statement is an abuse of discretion where no opportunity was given him to modify, explain or add to it. 270.

NUISANCE—

Bursting of engine on public road. 317.

Although a garbage reduction plant by contract with the city under G. C., 3809, is performing a public health function, yet its emission of odors to the annoyance of dwellers half a mile away will be enjoined if attributable only to carelessness or accident. 533.

One not suffering any injury by a public nuisance, as a fence in the limits of a highway, has no right to take the law in his own hands and abate it; hence, an electric railway tearing down the fence and causing the owner's arrest for resisting, who now sues for false arrest, can not sustain a directed verdict in its favor where the record fails to show that it was such a road as was entitled to use the highway without appropriation. 401.

OFFICE AND OFFICER—

Compensation to sheriff for feeding prisoners. 177.

No personal liability for *quasi-judicial* acts performed by an officer. 183.

Charges can not be tried unless they embody facts apprising the defendant of what he is to meet. 55.

A mayor may entertain charges against a city civil service commissioner without the state civil service commission first investigating the defendant's conduct. 55.

The practice of the official who is to try a subordinate of making the charges, thus appearing both as accuser and judge, is at least questionable. 55.

If a proposed act is legal the motive which prompts it is not material; for any subsequent unlawful use of the result can be enjoined when attempted. 369.

PARENT AND CHILD—

The father of an illegitimate child can be prosecuted for its non-support under G. C., 12970, although it does not mention illegitimate children, as well as under Section 13008, although the municipal court has no jurisdiction under the latter section. 447.

In prosecution of a man for failure to provide necessities to his child by a married woman who had been abandoned by her hus-

band, she is a competent witness to testify to the non-access of her husband. 447.

PARTIES—

Where the defendant was designated "The Commissioners of Guernsey County, Ohio," a demurrer for defect of parties was sustained and leave given to amend by inserting in the caption the words "Board of." [Affirmed without report, 88 O. S., 586.] 415.

As to the joining of trustee and beneficiary as plaintiffs. 225.

As plaintiff may sue some of several joint tort-feasors, so, having sued, all may be dismissed. 443.

An insane ward having filed an action for damages, the court may allow the guardian to be substituted as plaintiff and to dismiss the action. 129.

PARTITION—

Heirs and devisees of property leased perpetually with privilege of purchase have no right to partition. 198.

PAYMENT—

To obtain release of goods is not voluntary. 276.

Payments by city officers of legal debt presumed authorized. 419.

PLEADINGS—

Where the contract of sale sued on has been destroyed by fire since suit brought, parol evidence of its contents should not be admitted until the loss is set up by supplemental petition. 225.

Where a defendant, being in default, obtained leave to file an answer pending a motion for judgment by default, the fact that he filed a general denial, which is not claimed to be sham, did not justify the court in striking the answer from the files and rendering judgment, and to do so is an abuse of discretion. 111.

A petition on a bond is demurrable if it fails to plead the con-

dition which is broken, although it makes the copy of the bond attached part of the petition. 97.

Where an amended petition on a bond fails to plead the condition broken, but the original petition had set out the bond in *haec verba*, a reviewing court may, on demurrer, search the record to ascertain that the terms of the bond preclude a recovery. 97.

In a foreclosure of a mortgage on half a tract, a second mortgagee of the whole tract duly served can not have foreclosure of his mortgage on the other half on a cross-petition filed after decree on the first mortgage and without service on the mortgagor. 551.

Defendant's motion for judgment on the pleadings can not be helped by denials in his answer or by affirmative allegations therein which are denied by the reply. 369.

PLEDGE—

The pledgee selling the pledger articles at private sale as authorized by the terms of the pledge acts as agent of the pledger and it is his duty as agent to exhibit the articles so as to attract buyers and use all other reasonable means to reach the fair value. 158.

Where the pledgee sells at private sale for less than the actual value this discrepancy need not be so great as to show intentional wrong in order to make him liable for the difference, but may be such as to show want of care and neglect of duty. 158.

PROHIBITION—

To court of insolvency. 1.

This writ lies only where unauthorized judicial or *quasi*-judicial power, which will result in injury, is about to be exercised, and there is no other adequate remedy. 11.

The mayor of a city has no jurisdiction, under G. C., 486-19, to remove a civil service commissioner for malfeasance, etc., on charges

which contain no averments of the facts, and, as no appeal or error lies, a writ of prohibition is a proper remedy. 55.

A person may apply in his individual capacity for this writ to prohibit an inferior tribunal from usurping a jurisdiction to his injury. 55.

PUBLIC UTILITIES COMMISSION—

Compliance with an order by the public utilities commission for the erection of a gate at a railroad crossing will be presumed to the satisfaction of the commission as to location where it takes no steps under G. C., 614-67, to enforce the order; and hence, under G. C., 549 (103 L., 816), no court except the Supreme can entertain the objection that the gate is not at the crossing. 572.

QUO WARRANTO—

The Court of Appeals of Franklin County has jurisdiction of an information by the Attorney-General against an individual of another county who is assuming to insure lives. G. C., 345 and 12311, giving jurisdiction to the circuit court, apply to the court of appeals. [Affirmed, 90 O. S., 363.] 218.

RAILWAYS—

Penalties for requiring employees to join relief association and waive damages for injuries. 572.

Gate ordered by public utilities commission; location objected to. 572.

Elimination of grade crossings by a city is a police power and not limited by the franchise of a traction company occupying the street, but the grade and location of the street may be changed and the traction company must adapt itself thereto. 513.

The cost of eliminating a crossing by building a viaduct being borne 65 per cent. by the steam

railroad and 35 per cent. by the city, the city obtained a judgment against a street railroad for about one-half of its 35 per cent., which is held to be reasonable under the circumstances. 513.

A city in contracting with a railroad to separate a crossing need not notify a street railroad company thereof or make it a party in order to compel it to adjust itself thereto or to contribute to the cost. 513.

RECEIVER—

Appointment of a receiver is erroneous where the appointment is an end in itself and not ancillary to other relief within G. C., 11894 and 11398. 497.

REFERENCE—

Appointment of one "as referee to take the testimony and on completion of evidence and argument to return the same to court with separate findings of law and fact for final disposition by the court," is an appointment of a referee and not a master commissioner. 481.

A consent entry appointing a named person referee, followed six weeks later by an entry reciting that the court "on its own motion" appoints the same person referee, who was duly sworn and qualified, is not an appointment by the court alone under G. C., 11476, but by consent under 11475, the later entry being merely to show acceptance and qualification. 481.

To review a referee's finding a motion for a new trial must be made before him and overruled and a bill of exceptions authenticated by him. 481.

REFORMATION—

Mistake must be proved by clear and convincing evidence and must be mutual. 559.

RELEASE—

Settlement with one bars an action against another tortfeasor. 191.

RELIEF ASSOCIATION—

See CONSTITUTIONAL LAW.

RESCISSION—

A statement by the buyer of property that bank stock which he turned in as part payment was worth \$235 per share whereas it was worthless, though such statement was made in good faith, is not the expression of an opinion, but one which he had no right to make unless he knew it had the value put upon it and entitles the other party to rescind. 262.

Where worthless bank stock innocently represented to be good is given as part payment for real estate which has since increased in value, the court in order not to deprive the buyer of the enhancement in value, will give him the option of submitting to a rescission or of compensating the vendor for her loss on the bank stock. 262.

ROADS—

Liability for injury to an onlooker from the bursting of the boiler of a traction engine on a public road. 317.

Who may remove obstruction from public road. 401.

Getting outside of traveled part of road not contributory negligence. 415.

SALES—

Where goods not selected by the buyer are sent to her house without a price being named or time fixed for approval, and she lets eight days elapse after learning that the goods were charged to her, this does not show a completed sale (G. C., 8399, sub. 2), and the seller is entitled as against her trustee in bankruptcy to the proceeds of sale. 63.

G. C., 8568, requiring the seller in case of a condition to place "thereon" his affidavit, is satisfied by attaching an affidavit written on a separate sheet. [Overruling 12 C.C.(N.S.), 15.] 51.

SCHOOLS—

Teachers have no vested rights in their positions and their rights

terminate with the period of employment. 581.

G. C., 7701, that a teacher shall not be dismissed except on written charges and a hearing does not enlarge G. C., 7708, giving him an action if dismissed for insufficient reason. Hence a discharge for immorality is not actionable on the ground if no proper notice but only if the jury find that the reason of discharge is insufficient. 581.

The management of schools of a city is vested in the superintendent and board of education and their policy in employing teachers can not be interfered with by the courts in the absence of abuse of discretion and an injunction against their refusal to appoint or reappoint an applicant who is or intends to become affiliated with a labor union is a nullity and the court has no power to punish a violation of such order. 581.

The right of the superintendent and board of education in employing teachers is a constitutional freedom of contract and their resolution not to appoint or reappoint any applicant affiliated with a labor union is a valid exercise of their authority. 581.

SENTENCE—

Though the record does not show that defendant was asked if he had anything to say why sentence should not be passed it will be presumed that such question was asked. 255.

G. C., 2166, being the indeterminate sentence law of 1913, if applied to prior offenses would be *ex post facto* and so far void; and if so applied the cause must be removed for re-sentence. 281.

SEWER—

Where an acreage tract with but one dwelling on it abuts on the street wherein the sewer is made, which sewer is not available to the dwelling and the tract can be subdivided to better advantage into lots facing said street, the assess-

ment will be limited to such frontage and to the average depth of lots. 542.

SHERIFF—

G. C., 2996, that the salary shall be in lieu of all fees and allowances and shall in no case exceed \$6,000, construed with G. C., 2997, that in addition to compensation and salary the county shall make allowances for feeding prisoners and does not require a report of such expenditures, entitles the sheriff to retain the excess over the cost of feeding prisoners. 177.

SPECIFIC PERFORMANCE—

A written agreement with the only parent of a child to adopt it and that it should inherit the same as if their own child, having been fully carried out by the child though not adopted, will be specifically enforced against the heir. 545.

Plaintiff having before suit had both actual and constructive notice that defendant by conveyance to a *bona fide* buyer had disabled himself to carry out an agreed exchange, is not entitled to have the suit retained for assessment of damages, for his remedy at law is adequate. 95.

STATUTES—

The practical construction given to a doubtful statute by the state or officers whose duty is to carry it into execution is entitled to great weight and not to be overturned unless clearly erroneous. [Affirming 15 N.P.(N.S.), 505.] 177.

STREETS—

Prior accidents as notice to city. 506.

Vacation of, for benefit of hospital; legality. 607.

SUMMONS—

On cross-petition; when necessary. 551.

SUNDAY LAW—

A moving picture show is a theatrical performance and therefore

forbidden on Sunday under G. C., 13049. 556.

SURETY—

Signer of note by duress became surety and payee becomes principal on transfer to innocent holder. 351.

Right to bring in principal, 351.

In an action for contribution, asking money only and no equitable relief, plaintiff is entitled to costs under G. C., 11624. 40.

A requirement in the bond that the owner must notify the surety of any default refers to a default terminating the contract or one on which liability is based and not to every technical default or slight variance. 292.

Changes of a minor character in the plans by order of the state inspector do not release the contractor's surety, especially if reported to one of its officers and not objected to by him. Parties are presumed to contract with reference to state inspection laws and to contemplate that minor changes might be ordered. 292.

Advances to the contractor beyond what he is entitled to, if made as loans and not as pre-payments, though to be repaid out of estimates, will not vitiate the bond. 292.

Payment of progress estimates in full instead of a percentage called for by the contract will not release the contractor's surety where they were made on the certificates of an architect who is not an agent or under control of the owner but is by the terms of the contract selected as an independent authority. 292.

TENDER—

Lawful part of unlawful demand. 65.

TRIAL—

On trial of an attendant in an insane hospital for killing a patient, it is depriving him of a constitutional right to admit the

coroner to testify to what other insane patients told him in defendant's presence as to the killing, other members of the medical staff testifying that such patients did not have capacity to observe or remember accurately what took place, defendant's silence is not an admission, for he was not required to speak. 257.

VENDOR AND PURCHASER—

In ascertaining the difference between market and contract values what the property brought on a re-sale at auction on less favorable terms of sale is not competent. 225.

Where the owner of property and one holding the legal title in trust for a creditor of the owner join in a contract to sell, they are both proper and necessary plaintiffs in an action for damages against the buyer who refuses to take, although the trustee was not to receive any part of the damages. 225.

In an action at law against a repudiating buyer the plaintiff must prove a proper title in himself, the same as in specific performance. 225.

A deed is presumed to have been delivered at its date in the absence of evidence; hence if dated before the grantor's contract to sell to defendant it is proper evidence of his inability to carry out his contract. 225.

Tender of a deed is unnecessary at law the same as in equity to a buyer who absolutely renounces the contract, for it would be a vain thing. 225.

VERDICT—

It is doubtful whether interrogatories to the jury and their answers are properly before a reviewing court where they do not appear in the bill of exceptions or transcript further than the court in its charge told the jury to answer certain interrogatories and among the papers of the case duly backed and marked filed is

a paper marked interrogatories. 84.

WILLS—

A subscribing witness signing before the testator signs does not invalidate the will where the signing was one continuous transaction. 485.

Although by G. C., 12080, an executor as made by statute a necessary party to a will contest, this does not alter the rule that he can not be allowed the expenses of an unsuccessful resistance. 298.

A will contest is a civil action and so denominated in G. C., 12079; therefore the three-fourths jury law (G. C., 11455) applies. 485.

WITNESS—

Wife can testify to non-access of husband as against father of her illegitimate child for non-support. 447.

Court's comment on credibility of, cured by rest of charge. 537.

WORDS AND PHRASES—

The word "owner" means absolute or fee simple owner. 283.

Testimony does not include evidence. 420.

WORKMEN'S COMPENSATION—

No appeal lies to the amount awarded to an injured employee, where some award has been made, G. C., 1465-75, making the award final. [Affirmed, 94 O. S., —.] 161.

Ex. W. J. F.

12-21-16

5233-20

HARVARD LAW LIBRARY

HARVARD LAW LIBRARY

HARVARD LAW LIBRARY

HARVARD LAW LIBRARY